2011

Susie Strohm and Dorsey and Whitney, LLP v. ClearOne Communications, Inc. : Brief of Appellant

Utah Supreme Court

IN THE UTAH SUPREME COURT

SUSIE STROHM AND DORSEY & WHITNEY, LLP, **Plaintiffs and Appellees,** **v.** **CLEARONE COMMUNICATIONS, INC.,** **Defendant and Appellant.**	**APPELLANT'S BRIEF** **Appellate Case No. 20110569 SC**

Appeal from the Third Judicial District Court, County of Salt Lake, State of Utah
Honorable Robert K. Hilder, Case No. 080917500

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STATEMENT OF JURISDICTION

This appeal is taken by Defendant and Appellant ClearOne Communications, Inc. ("ClearOne") from a final judgment of the Third Judicial District Court. Thus, the Utah Supreme Court has jurisdiction of this appeal pursuant to Rule 3(a) of the Utah Rules of Appellate Procedure and Utah Code Section 78A-3-102(3)(j).

STATEMENT OF THE ISSUES

ClearOne raises the following issues on appeal:

(a) Does the perjury conviction of Plaintiff Susie Strohm ("Strohm") preclude ClearOne from indemnifying Strohm because she did not act in good faith, in the corporation's best interests, or in the reasonable belief that her conduct was lawful, as required by Utah Code section 16-10a-902 and ClearOne's bylaws?

(b) Is Strohm entitled to mandatory indemnification under Utah Code section 16-10a-903 and -907 in light of ClearOne's bylaw requirements and Strohm's conviction?

(c) Does the scope of the engagement letter of Plaintiff and Appellee Dorsey & Whitney, LLP ("Dorsey") cover the federal criminal case against Strohm?

(d) If the Dorsey engagement letter covers the federal criminal case, does it incorporate by reference the attorney fees and/or 18% interest rate terms set forth in the engagement letter from Strohm's predecessor counsel?

(e) Does Utah public policy prohibit a *pro se* litigant such as Dorsey from recovering attorney fees incurred in its collection action against a non-client payor?

(f) Did ClearOne have the right to terminate its obligations to Dorsey?

(g) Since the district court previously ruled that the rate of counsel Milo Steven Marsden ("Marsen") (ultimately determined to be $360 per hour) was intended to be the highest rate under the Dorsey engagement letter, was it an abuse of discretion or an error of law to order ClearOne pay rates of $515 per hour and $400 per hour for out-of-state counsel?

(h) Was it an abuse of discretion or an error of law to order ClearOne pay out-of-state counsel rates that were higher than Utah rates and/or travel-related expenses incurred by out-of-state counsel to travel to and from Utah?

(i) With respect to its attorney fees in Plaintiffs' civil case, were Plaintiffs required to allocate their fees between those claims, on the one hand, which authorize attorney fees and on which they were successful and, on the other hand, all other claims?

(i) Was it an abuse of discretion for the trial court to award fees to Plaintiffs on the civil case in the absence of an allocation between successful claims that authorize attorney fees and all other claims?

STANDARD OF REVIEW

The standard for review for each of the issues before the Utah Supreme Court is the same, with additional considerations regarding certain issues discussed below. Specifically, since the rulings and orders on appeal stem from the district court's entry of summary judgment, the Court reviews the district court's rulings at issue *de novo*, or for correctness, affording no deference to the district court's conclusions. *See, e.g.*, *Petersen v. Riverton City*, 2010 UT 58, ¶ 8, 243 P.3d 1261 ("'We review a district court's decision to grant summary judgment for correctness, granting no deference to the district court's conclusions . . . .'" (omission in original) (quoting *Bodell Constr. Co. v. Robbins,* 2009 UT 52, ¶ 16, 215 P.3d 933)); *Bonham v. Morgan*, 788 P.2d 497, 499 (Utah 1990) ("That same lack of deference applies to the trial court's interpretation of statutes, which likewise poses a question of law.").

With respect to issues (g), (h) and (i), if they are not reviewed for correctness, then they may be subject to an abuse of discretion standard of review. *See Dixie State Bank v. Bracken*, 764 P.2d 985, 991 (Utah 1988) (stating that the amount and reasonableness of attorney fees awarded is reviewed for abuse of discretion).

PRESERVATION OF ISSUES

The issues at bar were preserved below by ClearOne's memoranda and oral arguments relating to the district court's rulings and orders under review. ClearOne preserved the issues on appeal by raising them in the following papers: (1) Defendant's September 26, 2008 Motion to Dismiss Plaintiff's Complaint, or Alternatively, for Summary Judgment, and for a Stay of Discovery (R. 448-96); (2) Defendant's October 20, 2008 Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment (R. 652-63); (3) Defendant's April 3, 2009 Motion for Summary Judgment as to Plaintiff's Fourth Claim for Relief (R. 1066-1103); (4) Defendant's September 15, 2009 Cross-Motion for Summary Judgment as to Defendant's First Counterclaim for Relief and in Opposition to Plaintiff's Motion for Partial Summary Judgment (R. 2024-2174); (5) Defendant's December 1, 2009 Cross-Motion for Summary Judgment in support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Renewed Motion for Partial Summary Judgment on Plaintiff's Third Claim for Relief (R. 2794-2922); (6) Defendant's August 16, 2010 Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Petition for an award of reasonable attorneys' fees and costs (R. 3631-77& 4276-4876); and (7) Defendant's February 22, 2011 Reply Memorandum re: Objections to Plaintiff's Proposed Judgment (R. 4976-98).

DETERMINATIVE STATUTES AND RULES

With respect to issues relating to the preclusion of ClearOne's indemnification of Strohm because of her perjury conviction, the determinative statutes are Utah Code sections 16-10a-902, -903, -905, and -907, which are included in the addendum.

STATEMENT OF THE CASE

This case is about the attempt by a small company, ClearOne, to stop exhorbitant and runaway legal fees claimed necessary to defend Strohm against serious federal criminal charges. The law firm, Dorsey, behaved as though it had been given a blank check. After Dorsey had blown through its litigation budget, ClearOne exercised its contractual right to stop advancing Strohm's criminal defense fees. While the district court ultimately held that ClearOne had properly exercised its right to cease advancement, Dorsey retaliated by suing ClearOne under numerous theories, including breach of an ambiguous engagement letter. After extensive motion practice and unnecessary and wasteful discovery, the district court ultimately handed ClearOne the bill. Not only was ClearOne held liable for what the district court deemed reasonable criminal defense fees, but also for interest at a usurious 18% rate plus 95% of Dorsey's additional runaway legal fees in the civil case. Fed up with this state of affairs, ClearOne now seeks relief in this Court.

On August 21, 2008, Strohm and Dorsey (collectively, "Plaintiffs") filed a complaint (the "Complaint") against ClearOne (R. 1-33). ClearOne moved to dismiss the Complaint or alternatively for summary judgment, and Dorsey cross-moved for partial summary judgment for breach of its engagement letter. On December 19, 2008, the district court granted ClearOne's motion in part and established that Strohm had no contractual or statutory right to advancement of her federal criminal defense fees, but otherwise denied both motions (R. 730).

On January 21, 2009, Plaintiffs moved for a preliminary injunction, again seeking advancement of Strohm's federal criminal defense fees. On February 12, 2009, the district court granted the injunction insofar as it related to expenses for experts, fact witnesses, and investigation necessary for Strohm's then-pending federal criminal trial, but otherwise denied the motion (R. 963). On February 27, 2009, Strohm was convicted of one count of felony perjury and acquitted on seven other counts (R. 4573).

Subsequent to Strohm's conviction, ClearOne moved for partial summary judgment on Dorsey's engagement letter claim, which the district court denied "without prejudice, subject to discovery" (R. 1569).

On July 29, 2009, Plaintiffs' filed their First Amended Complaint, which dropped their claim for injunctive relief and added a claim for mandatory indemnification (R.1599-1600). On August 19, 2009, ClearOne filed its Answer and Counterclaims against Strohm for breach of contract and related claims regarding Strohm's undertaking promise to repay ClearOne if it was ultimately adjudged that she did not meet the requisite standard of conduct (R. 1983-87).

On August 12, 2009, Plaintiffs moved for partial summary judgment with respect to Plaintiffs' recently asserted claim for mandatory indemnification (R. 1812-14). ClearOne cross-moved for summary judgment on Strohm's undertaking promise to repay ClearOne (R. 2024-25). The district court granted Plaintiffs' motion and denied ClearOne's cross-motion (R. 2644), on October 26, 2009, and issued an "Order-Indemnification," on November 19, 2009, requiring ClearOne to indemnify Strohm for the "reasonable expenses incurred by her in connection with the proceeding or claims

with respect to which she has been successful" and to pay Strohm's "reasonable expenses incurred in order to obtain court-ordered indemnification" (R.2772 ¶ 1(a)-(b)).

On November 5, 2009, Dorsey renewed its motion for partial summary judgment with respect to the Dorsey engagement letter (R. 2645-47). ClearOne cross-moved for summary judgment with respect to all claims in Plaintiffs' Amended Complaint except for the mandatory indemnification claim (R. 2886-88). On March 2, 2010, the district court issued its Ruling and Order granting Dorsey's renewed motion (R. 2956-68).

On June 30, 2010, Dorsey filed its petition for attorneys' fees and costs (R. 2975-3150) and ClearOne cross-moved, *inter alia*, for a declaration that Utah public policy prohibits use of corporate funds in connection with a claim on which a jury has determined the corporate officer did not satisfy the requisite standard of conduct (R. 3631-32). On January 24, 2011, the district court issued its Ruling and Order granting in part Dorsey's petition and granting ClearOne's cross-motion for a declaration on Utah public policy (R. 5149-84).

On June 8, 2011, the district issued Judgment to Plaintiffs for $972,737.37 in criminal fees and expenses, $362,171.48 in interest on criminal fees and expenses (and accruing at 18% until paid), and $865,490.41 in civil fees and expenses (and accruing at 2.3% until paid) (R. 5310-12). This appeal followed.

STATEMENT OF FACTS

Strohm was employed by ClearOne, most recently as CFO, until her resignation effective December 5, 2003. On January 15, 2003, the U.S. Securities and Exchange

Commission filed a civil action against ClearOne, Strohm, and then-CEO Frances M. Flood ("Flood").

A. Marsden, then at Bendinger, Was Not Retained to Handle a White-Collar Criminal Defense

In late January 2003, ClearOne's then-co-CEO Michael Keough ("Keough") signed an engagement letter written by Marsden, then at Bendinger, Crockett, Peterson & Casey, P.C. ("Bendinger"), "to represent Susie Strohm's interests in connection with the SEC civil complaint … and in connection with further related investigations and litigation." In material respect, the Bendinger engagement letter stated "[a]ny amount billed and unpaid after such thirty day period shall bear and accrue interest at the rate of 18% per annum from the date billed until paid" and "we shall be entitled to recover all reasonable costs expended in connection with collecting amounts due under this Agreement, including reasonable attorneys' fees" (R. 42-43). Marsden's rate under the Bendinger engagement letter was $255 per hour, discounted by 10% (R. 43).

Bendinger was a "litigation boutique" consisting of 15-22 securities and antitrust litigators (R. 2914, T18:11-21). As of January 2003 – when the Bendinger engagement letter was signed – Marsden himself was not handling any white-collar criminal cases and does not know if anyone at Bendinger was handling a white-collar criminal case (R. 4030, T19:9-22). As of January 2003, Marsden had not held himself out as a white-collar criminal law specialist (*id.* at T19:23-20:4). In contrast, Flood's attorney Max Wheeler ("Wheeler") "is a highly visible criminal law specialist" and is "known in the community as a criminal lawyer" (R. 2913, T17:25- R.2914, T18:5).

B. The Dorsey Engagement Letter

On March 31, 2004, Keough, then ClearOne's co-CEO, signed a second engagement letter written by Marsden, which stated that he had left Bendinger and joined Dorsey, that "our engagement agreement needs to be updated to reflect this move," and "[t]he rest of this letter is intended to serve as the update" (R. 47). Marsden's rate under the Dorsey engagement letter was $255 per hour, "subject to adjustment from time to time." Ultimately, ClearOne paid $14,780 in 2004 for Dorsey to finish up the then-pending civil litigation involving Strohm.

C. Bendinger Performs Virtually No Services in Connection with the Grand Jury Investigation

Bendinger's invoices for its representation of Strohm from January 15, 2003 through January 14, 2004 do not make any reference to a U.S. Department of Justice investigation or a grand jury investigation or to any potential criminal issue, except for the following entries:

01/31/03 [Aaron G. Murphy] **Research re: criminal liability**; research re: causes of action; attend joint defense meeting; conference w/S. Marsden re: strategy and issues; call to S. Strohm. 7.70 hrs 150 /hr 1,155.00

04/16/03 [Aaron G. Murphy] **Review letter from R. Snow re: AUSA investigation.** .20 hrs 150 /hr 30.00

R. 2847-66 (emphases added).

Marsden first learned about the grand jury investigation in January 2003 (R. 2916, T66:10-13). Strohm was not asked to appear before the grand jury and never received a subpoena from the grand jury (R. 2917, T73:25- R. 2918, T74:3; R. 2922, T169:6-11). In connection with the U.S. Department of Justice investigation in 2003, there was very

little for Bendinger to do because the U.S. Attorney was not talking to Strohm and Marsden "wasn't going to go talk to the US Attorney" (R. 2918, T74:24-75:11).

D. Marsden Does Not Disclose the Grand Jury Investigation as a Pending Matter When He Informs Dorsey about His "Major Client" Strohm

When Marsden was considering switching firms, he completed a "Dorsey & Whitney LLP Conflicts and Screening Report and Professional Background Information" form (the "Dorsey Conflicts and Screening Report") on January 5, 2004 (R. 2881-85; R. 4035, T151:7-24). One of the questions on the Dorsey Conflicts and Screening Report asked Marsden to:

> Please identify your major clients who you would expect to become clients of Dorsey & Whitney LLP upon your joining the firm. Please also identify the adverse parties in the files on which you are currently representing these clients.

R. 2881.

In response to the above question on the Dorsey Conflicts and Screening Report, Marsden identified "Susie Strohm" as one of his major clients and identified several "adverse parties," but he did not identify the United States or the U.S. Department of Justice, or the U.S. Attorney's Office as an adverse party (R. 2882). In addition, Marsden listed the SEC Action and other civil litigations on the Dorsey Conflicts and Screening Report, but he did not list any criminal investigation (*Id.*; R. 2919, T153:23-R. 2920, T155:3). After his arrival at Dorsey, the first thing that led Marsden to believe that Strohm might actually be criminally charged was when he was called by Assistant U.S. Attorney Stewart "Stu" Walz ("Walz") in April or May ***2007***. (R. 2921, T165:24-R. 2922, T166:11).

E. Strohm Is Indicted Three Years Later and ClearOne Pays Dorsey's Criminal Invoices Pursuant to and Indemnification Provision of Strohm's Employment Termination Agreement

More than three (3) years later, on July 25, 2007, Strohm was indicted by a federal grand jury. ClearOne paid several months of Dorsey's invoices, then stopped paying entirely. When Dorsey sent its engagement letter to ClearOne in late 2007, ClearOne responded that it did not view the engagement letter as applicable to the federal criminal proceeding. On February 27, 2009, Strohm was convicted on one count of perjury and was acquitted on the remaining seven counts.

F. ClearOne Terminates Dorsey's Representation of Strohm

On November 30, 2009, ClearOne sent a letter to Dorsey stating that while it did not believe that the Dorsey engagement letter covered the federal criminal proceeding, ClearOne requested that Dorsey withdraw immediately from any further representation under the Dorsey engagement letter (R. 4872). Dorsey denied that ClearOne had the power to terminate its obligations under the Dorsey engagement letter (R. 4874).

SUMMARY OF THE ARGUMENT

The district court erred in allowing Dorsey to recover civil case fees because Utah public policy prohibits *pro se* law firms from recovering attorney fees on their own collection actions. Utah public policy also prohibits the use of corporate funds after a jury determination that a corporate officer did not satisfy the requisite standard of care. Similarly, Strohm's perjury conviction disqualified her from mandatory indemnification by virtue of ClearOne's governing corporate documents.

With respect to the 2004 Dorsey engagement letter, the district court improperly held that the letter compelled ClearOne to cover Strohm's then non-existent and unanticipated federal criminal proceeding. Furthermore, the district court erroneously held that the Dorsey engagement letter incorporated by reference the 18% interest and attorney fees terms from the Bendinger engagement letter, despite the lack of a specific reference to such terms and an indication that they were intended to be incorporated. Even though ClearOne is not Dorsey's client, fee agreement between lawyers and non-client payers should be carefully scrutinized to ensure that they are fair to the payer. (And they should be construed against the attorney-drafter).

ClearOne did not waive its right to contest the amount of attorney fees paid to Dorsey prior to litigation and the district court erred by applying the Voluntary Payment Doctrine. An 18% interest rate in an attorney engagement letter is unreasonable and thus unenforceable as a matter of public policy. ClearOne also had the power to terminate its payment obligations pursuant to the terms of the Dorsey engagement letter.

Dorsey charged excessive rates, hours, and travel expenses to defend Strohm in the criminal case. With respect to the civil case, Dorsey must allocate its fees and expenses between compensable and noncompensable claims and it was error for the district court to conclude that Dorsey's civil fees were 95% compensable.

ARGUMENT

I. THE DISTRICT COURT INCORRECTLY GRANTED DORSEY ATTORNEY FEES UNDER DORSEY'S ENGAGEMENT LETTER BECAUSE UTAH PUBLIC POLICY PROHIBITS A *PRO SE* LITIGANT (DORSEY) FROM RECOVERING FEES

The Utah Supreme Court has consistently held that a law firm is not entitled to attorney fees in a *pro se* collection action even if the agreement includes an attorney fee provision. *See Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1374 (Utah 1996) ("*Jones Waldo*"). In this case, the district court authorized Dorsey to collect attorney fees on its own engagement letter and distinguished *Jones Waldo* on the grounds that Dorsey "also represents Ms. Strohm" (R. 2966) and that "Dorsey is not suing its client" (R. 2967). In view of the public policy bases articulated by the Utah Supreme Court for disallowing pro se litigants from recovering their own attorney fees, the district court erred in distinguishing *Jones Waldo* and permitting Dorsey to recover attorney fees on its own engagement letter.

In *Jones Waldo*, the Court was faced with a retainer agreement which stated that "the undersigned ... agrees to pay all collection costs, including attorney's fees incurred in the enforcement of this agreement." *Id.* at 1374. In holding that the law firm could not recover its own attorney fees in connection with its collection action, the Court reasoned:

> In *Smith v. Batchelor*, 832 P.2d 467, 473 (Utah 1992), we recognized the "general rule that pro se litigants should not recover attorney fees for successful litigation." Although, as we acknowledged in *Batchelor*, the jurisdictions are divided in their treatment of the issue, we here reaffirm our view that the ability to competently present the claim without retained counsel is a sufficient advantage for a lawyer-litigant.
>
> . . . .
>
> There are other compelling public policy reasons for holding that "pro se litigants should not recover attorney fees, regardless of their professional status." *Id.* "Financing litigation by fee awards provides a new incentive to

> lawyers to increase their fees. The adversary's response is to litigate the fee claim itself." Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 Duke L.J. 435, 438 [hereinafter Dobbs]. This gives rise to the danger of "creating a 'cottage industry' for claimants ... as a way to generate fees rather than to vindicate personal claims." *Falcone v. Internal Revenue Serv.*, 714 F.2d 646, 648 (6th Cir. 1983) (declining to award attorney fees for pro se representation to prevailing plaintiffs under Freedom of Information Act). As the court in *White v. Arlen Realty & Development Corp.*, 614 F.2d 387, 388 (4th Cir. 1980), observed: "It is axiomatic that effective legal representation is dependent not only on legal expertise, but also on detached and objective perspective. The lawyer who represents himself necessarily falls short of the latter."
>
> In addition, "in the case of a paying client, the lawyer who wants to retain client satisfaction will have an incentive to limit the total fee. That incentive is not present in fee award cases." Dobbs, *supra*, at 485. Although the case at hand provides a working illustration of all of the above problems, this last concern is probably the most serious. By way of example, [Attorney] Shaw sought to charge [Client] Dawson $900 for his time preparing for and appearing at trial as a witness. A captive client, such as Dawson became in this collection action, has no control over the amount of time the attorney will spend or how it will be spent. And plaintiff has no motivation to explore less expensive collection alternatives.
>
> Plaintiff points out that *Batchelor* treated an award of attorney fees under a statute rather than a written retainer agreement as in the instant case. We conclude that plaintiff is not aided by that difference.

Id. at 1374-75.

Furthermore, the Utah State Bar Ethics Advisory Opinion Committee has opined, citing *Jones Waldo*, that "[u]nder Utah case law, a lawyer may not collect attorney's fees in a pro se collection action, and a law firm may not collect attorney's fees in a collection action in which the firm uses its own lawyers to collect debts of the firm." Utah State Bar Eth. Advisory Committee Op. 96-09 (Nov. 1, 1996).

Therefore, Dorsey is not entitled to collect attorney fees in connection with its *pro se* collection action against ClearOne. With respect to its Dorsey engagement letter

claim, Dorsey is representing itself – not Strohm – and is therefore *pro se* (R. 25-26). Since Dorsey is using only its own attorneys in the instant collection action against ClearOne, and is seeking to collect pursuant to an engagement letter which it claims has an attorney fees provision, Dorsey has not "incurred" and is not entitled to recover "attorneys' fees" from ClearOne pursuant to the Dorsey engagement letter, for all of the public policy reasons set forth in *Jones Waldo*.

II. UTAH PUBLIC POLICY PROHIBITS USE OF CORPORATE FUNDS AFTER A JURY DETERMINATION THAT THE REQUISITE STANDARD OF CONDUCT WAS NOT SATISFIED

Utah corporations have authority to indemnify directors and officers in accordance with the following provision:

> [A] corporation may indemnify an individual made a party to a proceeding because he is or was a director [or officer], against liability [including counsel fees] incurred in the proceeding if:
>
> (a) his conduct was in good faith; and
>
> (b) he reasonably believed that his conduct was in, or not opposed to, the corporation's best interest; and
>
> (c) in the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful.

Utah Code Ann. § 16-10a-902(1); *see also id.* 907(2). This statutory provision establishes a Utah public policy prohibiting the use of corporate funds unless the corporate director or officer has satisfied the requisite standard of conduct.

Strohm's perjury conviction is simply incompatible with these conduct standards. In the federal criminal proceeding against Strohm, Judge Dee Benson instructed jurors that in order to convict, the government had to prove beyond a reasonable doubt that "the defendant knew [a material] statement [made under oath] was false [when] that statement

was made" (R. 2110, 2114, 2160, 2168). Ultimately, the jury found that Strohm knowingly lied under oath when she denied that she was involved in ClearOne's sale of product to Production Audio – one of the primary transactions at issue in the federal criminal case (R. 2099).

Turning to the relevant conduct standards, Strohm could not have acted in good faith since she knowingly lied under oath in the SEC Action when she claimed that she was not involved in the Production Audio sale. *See U.S. v. Weissman*, No. S2 94 Cr. 760 (CSH), 1997 U.S. Dist. LEXIS 8540, at *27 (S.D.N.Y. June 16, 1997) (stating that Weissman's "perjury conviction was necessarily premised on a finding by the jury that he engaged in 'deliberate dishonesty.'"); *Biondi v. Beekman Hill House Apt. Corp.*, 731 N.E.2d 577, 581 (N.Y. 2000) ("Because the underlying Federal judgment establishes that Biondi's acts were committed in bad faith, Biondi is not entitled to indemnification and cannot relitigate the good faith versus bad faith issue here."); *People v. Kazmierski*, 25 P.3d 1207, 1214 (Colo. 2001) ("False statements, either intentionally or recklessly made, are the antithesis of good faith.").

Moreover, Strohm could not have reasonably believed that her conduct in lying under oath in the SEC Action was in, or not opposed to, ClearOne's best interests. Furthermore, by lying under oath in an official proceeding in federal court, Strohm had reasonable cause to believe that her conduct was unlawful. *See In re Adelphia Communications Corp.*, 323 B.R. 345, 389 (Bankr. S.D.N.Y. 2005) ("Likewise (as a consequence of the scienter requirement inherent in any criminal verdict), this Court

cannot find that either of [the defendants] had no reasonable cause to believe that his conduct was unlawful.").

Therefore, as a matter of Utah public policy, ClearOne's corporate funds cannot be used to pay fees and expenses that are reasonably allocable to Strohm's perjury conviction. This should include at least one-eighth of the pre-verdict reasonable fees and expenses, plus all of the post-verdict fees and expenses. *See Merritt v. Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138, 141 (Del. 1974) (explaining that claimants are only entitled to partial indemnification if they were successful in defending against some counts, but were unsuccessful in their defense of other criminal charges). Significantly, the district court ruled that Strohm is entitled to mandatory indemnification for the "reasonable expenses incurred by h[er] in connection with the proceeding or claim[s] with respect to which [s]he has been successful" (R. 2993-94 ¶1(a)). Utah public policy requires a similar limitation on Dorsey's engagement letter claim as well.

Utah public policy addresses the purposes for which corporate funds can be used. As expressly set forth in the "Indemnification" section of the Utah Revised Business Corporation Act, indemnification for expenses incurred in connection with a proceeding for which an officer is made a party by reason of her corporate status is limited to conduct that satisfies the requisite standard of conduct. Thus, while "a corporation ***may*** indemnify" a corporate officer who satisfies the requisite standard of conduct, a Utah corporation is literally without authority to indemnify a corporate officer whose conduct does not satisfy the requisite standard of conduct. Utah Code Ann. § 16-10a-902(1) (emphases added).

In the district court, Dorsey contended that the court's determination that the Dorsey engagement letter covers the criminal case "render[s] moot" any issue of allocation of fees and expenses between the criminal counts on which Strohm was successful and the perjury count on which she was convicted (R. 2976 n.1). Implicitly, Dorsey contended that parties to an engagement letter can enter into an enforceable contract in violation of Utah public policy. However, the standards of conduct themselves would be rendered moot if a Utah corporation can be compelled by contract to use corporate funds for a purpose that Utah law expressly prohibits. Clearly, no contract governed by Utah law can be enforced in contravention of Utah public policy. *See Healey v. J.B. Sheet Metal, Inc.*, 892 P.2d 1047, 1051-53 (Utah Ct. App. 1995) (finding that indemnity clause violates Utah public policy and thus is void and unenforceable); *Jacobsen Constr. Co. v. Blaine Constr. Co., Inc.*, 863 P.2d 1329, 1329-30 (Utah Ct. App. 1993) (holding that the "indemnification provision in the contract is void because it contravenes public policy").

While the district court correctly held below that ClearOne did not have an obligation to pay Strohm's post-verdict attorneys' fees and costs (R. 5153-54), it erroneously held that Strohm's single perjury conviction was not sufficiently serious to disqualify Strohm from indemnification altogether, stating:

> The one perjury conviction, standing apart from the securities fraud allegations, and coming later in time, does not carry the same force or public policy concern. While the Court reiterates that Ms. Strohm should not receive fees related to the single count upon which she was convicted, this Court is persuaded that based on the overall success of her defense, and her complete vindication of any securities fraud charges, it would be inconsistent with both the indemnification statutes for officers, and the

> engagement agreements, to allow ClearOne to avoid both a statutory responsibility and a contractual obligation it voluntarily incurred.

(R. 5153). Significantly, Strohm committed perjury in her official ClearOne capacity when she testified under oath at the SEC's enforcement proceeding. Indeed, if Strohm was not acting in her official capacity, corporate indemnification would not even be potentially available to her. *See* Utah Code Ann. § 16-10a-902 (stating that "a corporation may indemnify an individual made a party to a proceeding because he is or was a director"). ClearOne urges that an officer convicted of committing perjury in her official corporate capacity – indeed, in connection with a federal SEC enforcement action – should not be entitled to indemnification in <u>any</u> respect, despite the district court's attempt to minimize the seriousness of the felony of perjury. A felony is a felony.

In sum, since Strohm's perjury conviction establishes that she did not satisfy the requisite standards of conduct, Utah public policy prohibits ClearOne's corporate funds from being used to pay any of Strohm's attorney fees and expenses.

III. STROHM IS NOT ENTITLED TO MANDATORY INDEMNIFICATION SINCE CLEARONE'S GOVERNING DOCUMENTS PROHIBIT INDEMNIFICATION FOR OFFICERS WHO FAIL TO SATISFY THE REQUISITE STANDARD OF CONDUCT

ClearOne's articles of incorporation authorize the creation of bylaws to manage the corporation:

> The Directors shall and the shareholders may adopt By-Laws which are not inconsistent with law or these Articles of Incorporation for the regulation and the management of the affairs of this corporation. These By-Laws may be amended from time to time, or repealed, pursuant to law.

(R. 1909, art. VIII (Articles of Incorporation of ClearOne predecessor Insular, Inc. (dated July 8, 1983))). Pursuant to its Articles of Incorporation, ClearOne has adopted bylaws

limiting indemnification to officers and directors who have satisfied the requisite standard of conduct:

> (a) Determination and Authorization. The corporation ***shall not indemnify*** a director under this section unless:
>
> (1) a determination has been made in accordance with the procedures set forth in Section 16-10a-906(2) of the Act that the director met the standard of conduct set forth in subsection (b) below; * * * *
>
> (b) Standard of Conduct. The individual shall demonstrate that:
>
> (1) his or her conduct was in good faith; and
>
> (2) he or she reasonably believed that his or her conduct was in, or not opposed to, the corporation's best interests; and
>
> (3) in the case of any criminal proceeding, he or she had no reasonable cause to believe his or her conduct was unlawful.

(R. 2077, art. 5.1 (emphases added)).

Since Utah Code sections 16-10a-903 and -907 expressly authorize a corporation to limit mandatory indemnification, and since ClearOne's corporate governance documents limit indemnification to officers and directors who can demonstrate that they met the requisite standard of conduct, Strohm is not entitled to mandatory indemnification because she cannot make that showing.

Moreover, ClearOne's bylaws expressly prohibit indemnification of a director or officer unless "a determination has been made in accordance with the procedures set forth in Section 16-10a-906(2) of the [Utah Revised Business Corporation] Act that the director met the standard of conduct set forth in subsection (b) below" (R. 2077, art. 5.1(a)(1)). Thus, not only is Strohm unable to demonstrate that she has satisfied the

requisite standard of conduct, but ClearOne's Board has not made a determination that such standard has been satisfied.

To the contrary, on March 25, 2009, in view of the jury's verdict, ClearOne's Board of Directors adopted the following corporate resolution:

> Pursuant to Utah Revised Business Corporation Act Section 16-10a902(1) and Article 5.1(b) of the Corporation's bylaws, the Board of Directors has determined, in view of the Court's instructions to the jury with respect to the Eighth Count of the Indictment (attached hereto) and the jury's unanimous verdict (attached hereto) finding Ms. Strohm guilty of perjury in connection with her testimony that she was not involved in the sale of ClearOne product to Production Audio, that:
>
> (a) Strohm's conduct was not in good faith; and
>
> (b) Strohm did not reasonably believe that her conduct was in, or not opposed to, the Corporation's best interests; and
>
> (c) Strohm had reasonable cause to believe that her conduct was unlawful.

(R. 2082-83 ¶ 1). Therefore, under the express terms of ClearOne's corporate governance documents, Strohm cannot be indemnified and the district court erred in ruling that Strohm was entitled to mandatory indemnification pursuant to Utah Code section 16-10a-903 (R. 2772 ¶ 1).

IV. THE DISTRICT COURT INCORRECTLY FOUND THE DORSEY ENGAGEMENT LETTER TO COVER MS. STROHM'S THEN NON-EXISTENT AND UNANTICIPATED FEDERAL CRIMINAL PROCEEDING

The district court ordered ClearOne "to pay Susie Strohm's reasonable legal fees incurred in her defense of federal criminal proceeding" (R. 2967). The district court ruled that the Dorsey engagement letter was ambiguous as to the scope of engagement – specifically, whether it covered Strohm's federal criminal proceeding – and ambiguous as to whether it incorporated by reference the attorney fees and 18% interest provisions

from the Bendinger engagement letter (R. 2957). Having concluded that the Dorsey engagement letter was ambiguous on these points, the district court then ordered discovery of extrinsic evidence and ultimately held that the Dorsey engagement letter incorporated said provisions and applied to the federal criminal case. ClearOne submits that this ruling was erroneous because it is the attorney-draftsman of an engagement letter who is required to clearly set forth its scope and terms. Since the engagement letter was ambiguous, it should have been construed against its drafter as a matter of law.

Utah follows "the general principle that a court will strictly construe terms in a contract against one who is 'both the attorney draftsman of and a party to the instrument.'" *Phillips v. Smith*, 768 P.2d 449, 451 (Utah 1989) (quoting *Continental Bank & Trust Co. v. Bybee*, 6 Utah 2d 98, 102, 306 P.2d 773, 775 (1957)); *see also Ellsworth v. American Arbitration Ass'n*, 2006 UT 77, ¶ 17, 148 P.3d 983 ("Any ambiguity in a contract is to be construed against the drafter."); *Milk 'N' More, Inc. v. Beavert*, 963 F.2d 1342, 1346 (10th Cir. 1992) (noting that "if there is ambiguity in the clause we should construe it against the drafter"); *Celgene Corp. v. KV Pharm. Co.*, No. 07-4819, 2008 U.S. Dist. LEXIS 58735, at *37 (D.N.J. July 29, 2008) (stating that "contracts between lawyers and clients are construed against the lawyer").

The Dorsey engagement letter dated March 31, 2004 – signed and drafted by "Milo Steven Marsden" – describes its scope as follows:

> [T]his letter confirms your engagement of Dorsey & Whitney, LLP ("the firm") to represent Susie Strohm in connection with the SEC civil complaint, referenced above, and in connection with further related investigations and litigation including, among others [3 then-pending civil actions].

(R. 47-50). The above description of the engagement is at best ambiguous with respect to the federal criminal proceeding because the language does not reasonably convey to ClearOne that it was intended to commit ClearOne to pay for a then-hypothetical and unanticipated federal criminal proceeding. Specifically, the scope of engagement reasonably describes the SEC ***civil*** complaint and further related ***civil*** investigations and ***civil*** litigation.

ClearOne's responsibility for Strohm's legal expenses in any criminal proceeding is not clearly or unambiguously expressed in the Dorsey engagement letter. The federal criminal proceeding against Strohm does not constitute either an "investigation" or a "litigation" "related" to the SEC ***civil*** complaint. Absent a definition in the agreement, all terms must be construed in accordance with their "plain meaning." *Kenny v. Rich*, 2008 UT App 209, ¶ 42, 186 P.3d 989. "Litigation," as that term is ordinarily used, refers to civil litigation only. A person being criminally prosecuted would never say that they are "litigating" with the government. Also, the specific listing of three civil cases in the above-quoted language further demonstrates that civil litigation was what was contemplated, not a criminal prosecution commenced by a federal indictment.

Significantly, the Dorsey engagement letter (dated March 31, 2004) was drafted ***after*** Strohm's Employment Termination Agreement ("ETA") (dated December 5, 2003). The ETA more broadly defined "Related *Proceedings*" to include "a grand jury investigation being conducted by the United States Department of Justice" as well as identified civil litigations (R. 35). Thus, the ETA does not characterize the grand jury investigation as a "litigation" and uses the broader term "proceeding." Notably, the

federal grand jury proceeding was defined in the ETA as one of the "Related *Proceedings*." Clearly, Strohm's attorneys knew how to draft an agreement to clearly and unambiguously cover a federal criminal proceeding. The Dorsey engagement letter, in contrast, "confirms your engagement of Dorsey … to represent Susie Strohm in connection with the SEC civil complaint … and in connection with further related investigations and litigation including [3 civil litigations]" (R. 47). Thus, the language used in the Dorsey engagement letter is limited to related *civil* matters and does not cover the federal criminal proceeding. Unlike the ETA, the Dorsey engagement letter does not use the terms "criminal," "grand jury," "Department of Justice," "U.S. Attorney," or even the term "proceeding."

Strictly construing the Dorsey engagement letter against its drafter, that document simply does not set forth an agreement by ClearOne to pay Dorsey's fees in connection with the federal criminal proceeding commenced more than three years later.

V. THE DISTRICT COURT ERRONEOUSLY HELD THAT THE DORSEY ENGAGEMENT LETTER INCORPORATED BY REFERENCE THE TERMS FROM THE BENDINGER ENGAGEMENT LETTER

While the district court conclusorily ruled that "[t]he Dorsey & Whitney letter implicitly incorporated the terms of the Bendinger letter, changing only those elements of the former agreement that were specifically addressed" (R. 2964), it erroneously ignored incorporation by reference rules and should be reversed.

As explained above, the Dorsey engagement letter should be strictly construed against Dorsey. The district court erred by construing the term "update" in the Dorsey engagement letter to mean "incorporate by reference." Indeed, even though while the

Bendinger engagement letter was not attached to the Dorsey engagement letter, and none of its terms were specifically referenced, the district court held that two highly prejudicial terms from the Bendinger engagement letter – namely its 18% interest and the "Attorney Fees" provisions – were incorporated by reference into the Dorsey engagement letter. This interpretation should be rejected because the Dorsey engagement letter did not reasonably apprise ClearOne that all the terms from the Bendinger engagement letter not modified by the Dorsey engagement letter were to be deemed incorporated by reference, just as if set forth fully therein.

When viewed in their entirety, the two engagement letters are stand-alone documents. Specifically, the Dorsey engagement letter seeks to set forth the entirety of terms that governed its representation of Strohm. The Dorsey engagement letter sets forth the scope of engagement, the fees, rates, disbursements, billing and payment methodologies, joint and several liability, advanced waiver of conflicts, and potential options for ending the relationship (R. 47-50). Similarly, the Bendinger engagement letter sets forth the scope of engagement, a $5,000 retainer, billing and payment methodologies, joint and several liability, rates and staffing, potential options for ending the relationship, an "Attorney Fees" provision, and an advanced waiver of conflicts (R. 42-44). Except for just four provisions, both engagement letters cover the same ground and largely say the same thing.

The four varying terms consist of: (1) the $5,000 retainer, (2) when payment is due, (3) the 18% interest provision, and (4) the "Attorney Fees" provision. While the Bendinger engagement letter requested a $5,000 retainer, the Dorsey engagement letter

did not. Dorsey does not contend that the $5,000 retainer provision somehow carried over to the Dorsey engagement letter and required that a new retainer amount be paid to Dorsey. No recipient of the Dorsey engagement letter would reasonably understand that it was required to compare and contrast the two engagement letters from two different law firms to determine which terms were not repeated in the second engagement letter so as to figure out – according to Dorsey's logic – what terms actually governed Dorsey's representation. *See Cohen v. Radio-Electronics Officers Union*, 679 A.2d 1188, 1196 (N.J. 1996) ("When contracting for a fee, therefore, lawyers must satisfy their fiduciary obligations to the client. The lawyer must explain at the outset the basis and rate of the fee.").

The Dorsey engagement letter is, in fact, conversational in tone and would not alert any potential client that it is attempting to sneak through two highly prejudicial and controversial terms:

> As you know, I recently left the law firm of Bendinger, Crockett, Peterson & Case, and joined the law firm of Dorsey & Whitney LLP. Our engagement agreement needs to be updated to reflect this move. The rest of this letter is intended to serve as the update.

(R. 47). Marsden's use of the terms "updated" and "update" in this letter reflect merely that he has switched law firms and that a new engagement letter needs to be entered into "to reflect this move." Marsden does not call it a "new" engagement letter because his representation of Strohm is simply continuing to allow the winding up and finishing of the then-pending (and minor) civil litigations. Rather, he calls it an "update." The "updated" "engagement agreement" is implicitly designed to take the place of the prior engagement agreement – which explains why virtually all of the material terms of the

engagement are repeated. Clients are entitled to a straightforward explanation of the terms of their lawyer's engagement and should not be subjected to underhanded attempts to incorporate by reference unfavorable terms from a document not attached to the engagement letter. As the Supreme Court of New Jersey stated in *Cohen*:

> Consistent with the special considerations inherent in the attorney-client relationship, the attorney bears the burden of establishing the fairness and reasonableness of the transaction. A court should construe an agreement between a lawyer and a client "as a reasonable person in the circumstances of the client would have construed it." *Restatement [of the Law Governing Lawyers]* § 29A cmt. d. Those principles apply as readily to retainer agreements as to other agreements between lawyers and clients.

Id. (citations omitted).

The district court's attempt to read into the Dorsey engagement letter the 18% and Attorney Fees provisions from the Bendinger engagement letter is not reasonably conveyed by the use of the term "update." Contrary to Dorsey's contention, "update" does not mean "incorporated by reference" or "amended only as stated herein." According to the American Heritage Dictionary, "update" means "[t]o bring up to date." AMERICAN HERITAGE DICTIONARY 1406 (1980). Thus, Marsden brought ClearOne and Strohm up to date by informing them that he had left his prior firm and joined Dorsey. They were not brought up to date by Dorsey's alleged attempt to incorporate by reference highly unfavorable terms from a prior engagement letter applicable to a different law firm. In view of the foregoing, the district court erred in ruling the 18% and Attorney Fees provisions are incorporated by reference in the Dorsey engagement letter.

The district court erred by failing to recognize – as a general proposition of law – that any attempt to incorporate terms from another document must clearly communicate both the express terms and the intent to incorporate them into the document at issue:

> To incorporate material by reference, the host document must identify with detailed particularity what specific material it incorporates and clearly indicate where that material is found in the various documents identified. In other words, the incorporating contract must use language that is *express* and *clear*, so as to leave no ambiguity about the identity of the document being referenced, ***nor any reasonable doubt about the fact that the referenced document is being incorporated into the contract.***
>
> . . . [T]he language used in a contract to incorporate extrinsic material by reference must explicitly, or at least precisely, identify the written material being incorporated and ***must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract*** (rather than merely to acknowledge that the referenced material is relevant to the contract, e.g., as background law or negotiating history).

Northrop Grumman Info. Tech., Inc. v. United States, 535 F.3d 1339,1344-45 (D.C. Cir. 2008) (emphases added). While the Dorsey engagement letter references the fact that Marsden has left Bendinger, it does not clearly or expressly communicate that the purpose of the reference is to incorporate terms from the Bendinger engagement letter into the Dorsey engagement letter. Nor are the express terms that Dorsey claims are incorporated specified in any way.

In addition to clear and express communication, courts have held that "the party to be bound by the terms must have had knowledge of and assented to the incorporated terms." *Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn*, 983 A.2d 604, 617-18 (N.J. App. Div. 2009) ("*Alpert Goldberg*") (citing to other jurisdictions adopting this principle). Moreover, in situations where an attorney's retention concerning fees and

charges is at issue, there is has a higher ethical and professional duty on the part of the attorney to provide complete information at the time of retention:

> Merely directing the client to ask for another document that is not directly presented and explained to the client but will bind him or her does not fulfill the lawyer's obligation pursuant to [the Rules of Professional Conduct] 1.4(c). This obligation to thoroughly explain all the terms of the retention is particularly appropriate, given the lawyer has a unique and fiduciary relationship with the client.

Id. at 616 (citations omitted). Here, such communication was not clear and, therefore, the Court erred in ruling that the Dorsey & Whitney letter incorporated the terms of the Bendinger engagement letter implicitly.

VI. FEE AGREEMENTS BETWEEN LAWYERS AND NON-CLIENT PAYERS SHOULD BE CAREFULLY SCRUTINIZED TO ENSURE THEY ARE FAIR TO THE PAYER

ClearOne submits that the 18% and Attorneys Fees terms are unreasonable and unfair to ClearOne pursuant to Rule 1.5(a) of the Utah Rules of Professional Conduct, which provides that "[a] lawyer shall not make an agreement for, charge or collect an unreasonable fee." Eighteen percent (18%) interest is significantly greater than the reasonable time value of money over the last 2-4 years. This reference to 18% was in the Bendinger engagement letter, but not the Dorsey engagement letter. Accordingly such interest should not be enforceable.

In *Alpert Goldberg*, the court found that the retention letter making reference to a separate document did not incorporate the terms of the separate document by reference, and since a 12% interest charge was only set forth in the separate document, it was not enforceable. 983 A.2d at 616-617 ("While [the law firm] made reference to [billing on an hourly rate] and … its 'standard billing practices and firm policies'), which would

provide details, nothing in [the retainer letter] would lead a reasonable client to conclude that it would be paying twelve percent interest on late charges, [and] all collection fees .... [The law firm] by inviting the client to seek out the [separate standard billing practices and firm policies] instead of explaining the full terms of its retention, impermissibly shifted its fiduciary duty to the client and undermined the intent and purpose of [Rule of Professional Responsibility] 1.5(b).").

Additionally, it is unreasonable to assess Dorsey's attorney fees for the cost of the instant litigation on ClearOne, which constitutes a significant departure from the prevailing American rule, and is contrary to Utah public policy.

Further, the Dorsey engagement letter specifically references Marsden's then-hourly rate of $255 (R. 47)), a rate largely in line with his Bendinger rate of $255 per hour with 10% discount (R. 42). Marsden's $255 hourly rate, however, differs vastly from the rates that Dorsey is seeking to apply in this case. According to Rule 1.5(b), "the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client." Utah R. of Prof'l Conduct 1.5(b). While the Dorsey engagement letter communicated Marsden's $255 rate, it did not attempt to apprise ClearOne that it was somehow also committing to significantly higher out-of-town rates by attorneys then unknown to ClearOne – not to mention Strohm herself. Thus, to the extent the Dorsey engagement letter might be deemed to apply to the instant dispute, it does not justify application of a rate higher than "the fee customarily charged in the locality for similar legal services." Utah R. of Prof'l Conduct 1.5(a)(3).

In sum, the Court should reject Dorsey's attempt to hold ClearOne responsible for 18% interest, attorney fees in this action, or a rate higher than $255 per hour.

VII. CLEARONE DID NOT WAIVE ITS RIGHT TO CONTEST THE AMOUNT OF ATTORNEY FEES PAID TO DORSEY PRIOR TO THE COMMENCEMENT OF LITIGATION

The district court erroneously applied the Voluntary Payment Rule set forth in *Southern Title Guaranty Co. v. Bethers*, 761 P.2d 951 (Utah 1988), to conclude that ClearOne had effectively waived its right to contest the amount of attorney fees paid to Dorsey prior to Dorsey's commencement of the instant litigation. Neither waiver nor the Voluntary Payment Rule is applicable in the instant context.

Southern Title is simply inapposite to the case at hand – both factually and legally. Significantly, the plaintiffs in *Southern Title* sought to clear the title to a plot of land that had long before been sold with a deed properly transferred. Plaintiffs received notice that the plot of land had already been paid for. Nevertheless, they still remitted an additional payment to clear title to the land. Subsequently, they claimed that the defendant was unjustly enriched by the payment and sought repayment of the money. The court utilized the Voluntary Payment Doctrine in *Southern Title* to justify its decision that plaintiffs were not entitled to repayment of the money that it had voluntarily paid with full knowledge of the facts concerning the plot of land it sought to clear title to.

Here, in contrast, ClearOne is not seeking repayment of money – in this case, the legal fees already remitted to Dorsey. Rather, ClearOne seeks a reasonability examination and determination with respect the totality of the criminal defense fees charged by Dorsey in this matter. In this regard, ClearOne seeks to have the legal fees already paid by ClearOne to Dorsey attributed to the total amount of legal fees charged

by Dorsey during the pendency of this matter. Since the reasonability analysis ClearOne seeks does not involve a request for repayment of the pre-litigation legal fees paid by ClearOne to Dorsey, the Voluntary Payment Doctrine is inapplicable here.

ClearOne has repeatedly argued that, in its reasonability analysis, the Court must consider each of the Dorsey bills – including those that were paid in whole or in part prior to the litigation. Indeed, ClearOne relied materially on the district court's stated intent to look at the totality of fees in determining reasonableness:

> I do think you're correct that we're looking at the totality of the entire bill under our criteria here under both the rule and under the cases that control, and we still talk about *Dixie State Bank v. Bracken* as the main one, but there's others who have followed up in the years since. We look at the totality, we look at the result, we look at a lot of factors, and I do think we've got to look at it all.

(R. 4660, T8:10-17). As a result, it is imperative that this Court take into consideration, not just the unpaid Dorsey legal bills, but the entirety of the legal fees and costs accrued to date in order to determine whether the fees and costs paid may be subtracted from the total amount of "reasonable" fees and costs. The district court ultimately failed to take the total amount of Dorsey's fees into account in connection with its "reasonable" fee analysis and, as a result, committed reversible error.

VIII. AN 18% INTEREST RATE IN AN ATTORNEY ENGAGEMENT LETTER IS UNREASONABLE AND THUS UNENFORCEABLE AS A MATTER OF UTAH PUBLIC POLICY

The court below further erred in concluding that since the 18% interest provision was a contractual provision, "it is enforceable unless determined to be unconscionable as a matter of law" (R. 2966 (citing *Knight Adjustment Bureau v. Lewis*, 2010 UT App 40, 228 P.3d 754)). While enforcement of contractual provisions unless unconscionable is

standard for the ordinary commercial context, Utah law governing the conduct of attorneys – as set forth in the Utah Rules of Professional Conduct and elsewhere – requires more.

In particular, Rule 1.5(a) of the Utah Rules of Professional Conduct expressly provides that:

> A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses.

Utah R. Prof'l Conduct 1.5(a). The rule proceeds to identify 8 factors "to be considered in determining the reasonableness of a fee" and none of those factors involve or allow charging interest for unpaid legal fees. *Id.*

Moreover, after ClearOne provided Dorsey with $225,000 to fund certain expenses in January 2008, Dorsey neglected to deposit these escrowed funds into an interest-bearing account for over a year and then, when Dorsey finally did so, the monies earned interest averaging less than 1% per year before they were refunded to ClearOne in July 2009. Given Dorsey's cavalier treatment of ClearOne's escrowed funds, Dorsey should be equitably estopped from claiming interest at any rate.

IX. CLEARONE PROPERLY TERMINATED ITS PAYMENT OBLIGATIONS PURSUANT TO THE TERMS OF THE DORSEY ENGAGEMENT LETTER

The Dorsey engagement letter expressly states: "we will withdraw from representation upon your request" (R. 48). On November 30, 2009 – nine months after the jury's verdict and six months before Strohm was sentenced – ClearOne terminated its payment obligations under the Dorsey engagement letter pursuant to this provision (R. 4872). The district court erroneously held that ClearOne did not have the power "to

unilaterally terminate the attorney-client relationship," which it claimed would be in violation of Rule 1.16(b) of the Utah Rules of Professional Conduct (R. 5151).

ClearOne never suggested, however, that it could force a severing of the attorney-client relationship between Strohm and Dorsey. ClearOne sought merely to put a stop to its own payment obligation, as allowed by the letter. If Strohm desires to engage Dorsey after the termination of the Dorsey engagement letter obligating ClearOne, that is her prerogative and she can enter into a new engagement letter without ClearOne's involvement.

A. ClearOne Has the Power, Pursuant to the Dorsey Engagement Letter, to End Its Obligation to Fund Dorsey's Post-Verdict Work on Ms. Strohm's Behalf

The district court's holding that ClearOne did not have the power to terminate the Dorsey engagement letter is erroneous because it requires giving two different constructions of the term "your" in the same document. The Dorsey engagement letter, dated March 31, 2004, is addressed to both ClearOne (by then co-CEO Keough) and Strohm. In the second paragraph, the letter expressly "confirms ***your*** engagement of Dorsey" (R. 47 (emphases added)), thus presumably referring to both ClearOne (the first recipient) and Strohm (the second recipient). Then, in its penultimate paragraph, the letter states: "we will withdraw from representation upon ***your*** request" (R. 48 (emphases added)). The district court implicitly construed the first "your" to commit both ClearOne and Strohm to the engagement, but construed the second "your" to mean only Strohm. Under Utah law of contract construction, the same word should not be construed differently in the same agreement.

As the court stated in *Home Savings & Loan v. Aetna Casualty & Surety Co.*:

> The correct rule is that a definition given to a term in one section of a contract, even though it is not in the general definition section, applies throughout the contract so that the term will be interpreted consistently throughout.

817 P.2d 341, 348 (Utah Ct. App. 1991). In other words, if the "your" in "your engagement of Dorsey" refers both to ClearOne and Strohm, then the "your" in "your request" must also refer to both ClearOne and Strohm. Nothing in the withdrawal sentence indicates that the request to withdraw must be joint. Any contention that the "your" in the withdrawal sentence really means "only Ms. Strohm" cannot withstand analysis. If "your" means "only Ms. Strohm," then the "your" in "your engagement of Dorsey" should mean that only Strohm has engaged Dorsey.

In writing the engagement letter, Marsden certainly knew how to specify Strohm only if that was the intended meaning. In fact, Marsden's letter refers solely to Strohm when that was the intent (R. 47 ¶ 1 ("We will provide legal services for and on behalf of Susie Strohm in connection with the above-described matters."); R. 48 (stating that "all of my firm's professional responsibilities under applicable law are owed solely to Ms. Strohm")). Since the Dorsey engagement letter used the term "Ms. Strohm" when it intended to refer exclusively to her, the term "your" in the sentence "we will withdraw our representation upon your request" must also refer to ClearOne. Therefore, ClearOne has the right under the express terms of the Dorsey engagement letter to terminate that agreement or, at least, to terminate ClearOne's obligation to pay pursuant to that agreement.

Moreover, at his deposition, Marsden testified that it was ClearOne's outside attorney who initially contacted him regarding representation of Strohm and it was clear

to him that he would be joining a defense team that would work jointly and be on common ground with Flood's attorneys and ClearOne concerning the SEC investigation (R. 5-55, T7:17-8:4; 8:18-22; R. 5056, T11:1-8). Therefore, it should also have been clear to Marsden that his engagement could be ended by ClearOne as well.

B. Strohm Has No Incentive to Terminate Dorsey's Engagement if ClearOne Has a Non-Terminable Obligation to Fund Strohm's Appeals

Moreover, Dorsey seeks to compel ClearOne to pay the attorney fees and expenses of Strohm's appeal of the perjury count on which she was convicted. Presumably, Dorsey contends that ClearOne has a non-terminable obligation to pay its fees to prosecute Strohm's entire criminal appeal, any new trial that might be ordered, any petition for rehearing that Dorsey might seek to file, any petition for writ of certiorari to the U.S. Supreme Court, and any other related investigation and/or litigation.

According to the district court, only Strohm has the power to terminate Dorsey's services (R. 5150-51). Strohm, of course, has no incentive to terminate Dorsey's services as long as it is ClearOne, and not she, who bears the obligation to pay. Indeed, if Strohm had to bear the burden of payment, she might well elect to accept the two years of probation and perform the 150 hours of community service to which she was sentenced. Significantly, Strohm could probably complete the community service and satisfy her probationary period before any decision on her appeal would be rendered.

It is precisely this scenario about which this Court expressed concern in *Jones Waldo*, wherein the Utah Supreme Court stated:

> [I]n the case of a paying client, the lawyer who wants to retain client satisfaction will have an incentive to limit the total fee. That incentive is not present in fee award cases. Although the case at hand provides a

> working illustration of all of the above problems, this last concern is probably the most serious. By way of example, [Attorney] Shaw sought to charge [Client] Dawson $900 for his time preparing for and appearing at trial as a witness. A captive client, such as Dawson became in this collection action, has no control over the amount of time the attorney will spend or how it will be spent. And plaintiff has no motivation to explore less expensive … alternatives.

923 P.2d 1366, 1375 (Utah 1996) (quotations and citation omitted).

C. Any Ambiguity in the Dorsey Withdrawal Clause Should Be Construed against Dorsey to Authorize ClearOne's Termination of Obligation to Dorsey

To the extent that there is any ambiguity in the "withdrawal" clause of the Dorsey engagement letter, such ambiguity should be construed against its attorney-draftsman. Utah follows "the general principle that a court will strictly construe terms in a contract against one who is both the attorney draftsman of and a party to the instrument." *Phillips v. Smith*, 768 P.2d 449, 451 (Utah 1989).

Moreover, absent a definition in the agreement, all terms must be construed in accordance with their "plain meaning." *Kenny v. Rich*, 186 P.3d 989, ¶ 42, 2008 UT App 209. Plainly, when Marsden uses the terms "I" and "we" in a conversational-tone letter to refer to himself and Dorsey, the term "you" refers to the parties to whom it was addressed – namely, ClearOne and Strohm, both of whom signed the Dorsey engagement letter. Having committed itself to withdrawing from representation upon "your" request, Dorsey cannot now disregard ClearOne's November 30, 2009 request to withdraw.

While noting and preserving its position on the scope of the Dorsey engagement, ClearOne made its intent clear:

> So as to avoid any confusion, we are writing at this time to clarify that ClearOne will not under any circumstances pay any invoices for services

> rendered or costs incurred after the [November 30, 2009] date of this letter pursuant to the Dorsey Engagement Letter.

(R. 4872).

In sum, since ClearOne terminated any payment obligation it may have had under the Dorsey engagement letter on November 30, 2009, ClearOne cannot be liable for any attorney fees or costs incurred after that date.

X. DORSEY CHARGED EXCESSIVE RATES, HOURS, AND TRAVEL-RELATED EXPENSES TO DEFEND STROHM IN THE CRIMINAL CASE

While Dorsey submitted its extensive billing history in its criminal defense of Strohm – but only for the period after March 2008 – the task descriptions and block billing entries are too insufficiently detailed to determine what the attorney or paralegal was actually doing.

This much is clear: in the aggregate, Dorsey billed at rates exceeding those customarily charged in Salt Lake City, often provided insufficient information to permit ClearOne to determine what tasks were being performed, billed excessive hours for the amount of work required, and invoiced ClearOne for travel-related expenses that would not have been necessary if a local attorney had led Strohm's criminal trial defense team.

A. The District Court Erred in Awarding Fees Higher than the $360 Rate Determined by the District Court to Be the Highest Rate Chargeable

In its March 2, 2010 Ruling and Order, the district court concluded:

> Dorsey & Whitney, as a large national firm, generally charged higher billing rates than were customary at Bendinger, Crockett, and the Court would suggest customary in this community at that time. In the Bendinger, Crockett engagement letter, Mr. Marsden recites his rate at $255 per hour, however, he also agrees to discount his rate by 10% under the agreement. The letter further recites that the rates are reviewed and adjusted annually. The letter indicates that billings shall be based on normal hourly rates for

> all employees of the firm who work on the matter, but the Court determines that the reasonable intention of the parties to be drawn from the Bendinger, Crockett letter is that Milo Steven Marsden was the lead attorney, and that except in unusual circumstances, his rate would be the highest rate.
>
> Fee discussion in the Dorsey letter restates Mr. Marsden's rate of $255 per hour, subject to adjustment, without reference to a discount.

(R. 2965).

Then, in its January 24, 2011 Ruling and Order, the district court concluded that Marsden's time should be awarded at $360 per hour for the criminal case given the passage of years from the March 31, 2004 Dorsey engagement letter until Dorsey's work on Strohm's criminal defense from 2007 through 2009 (R. 5168). ClearOne does not contest this ruling or any of the district court's findings with respect to the customary local rates for Dorsey's Utah attorneys (R. 5168-69).

However, the district court abused its discretion by finding that the proper rate for William Michael ("Michael") – Strohm's lead criminal counsel – should be $515 per hour (R. 5167-68) and that Christopher Shaheen's("Shaheen") rate should be $400 per hour (R. 5168). While both attorneys are based in Minneapolis, their awarded rates should not exceed the rates customarily charged in Utah.

Significantly, the district court determined that Marsden's rate "except in unusual circumstances … would be the highest rate" (R. 2965). The district court held that the Dorsey engagement letter was intended to cover Strohm's federal criminal case (*see* Point IV above), and rejected ClearOne's contention that it did not intend to retain Marsden for any criminal case, even though Marsden – by his own admission – is not regarded as a white collar criminal defense attorney:

> [N]othing in the evidence supports the view that Mr. Marsden was so unidentified with criminal practice that his retention requires a conclusion that the two letters did not contemplate criminal defense.
>
> In fact, in the Salt Lake legal market, some of the best practitioners may wear two or more hats. Indeed, Max Wheeler, who has been cited in this case as the quintessential white collar criminal lawyer, is also well known as a skilled litigator in complex commercial matters, among others. There is not[h]ing anomalous about the roles assumed in this case by Mr. Marsden or his colleagues.

(R. 2962).

Having concluded that the engagement letters -- which the district court construed as a single agreement – expressly contemplated a criminal defense by Marsden, the district court then subsequently offers a contradictory explanation to justify exceeding the $360 customary local rate:

> [W]hile plaintiffs argue, and the Court has agreed, that the specter of criminal proceedings was known to ClearOne from the beginning, the ultimate form and complexity was not known. It was a matter of professional responsibility for Dorsey to staff the case as it evolved, with lawyers best able to represent Ms. Strohm. There can be little argument that Mr. Michael was an appropriate choice. Mr. Michael's time shall all be calculated at $515 per hour.

(R. 5167-68).

ClearOne respectfully submits that it was an abuse of discretion for the district court to hold, on the one hand, that criminal proceedings were expressly contemplated and that Marsden was fully capable of "wear[ing] two or more hats" as commercial and criminal defense counsel, but that the ultimate form and complexity of the criminal proceeding was not known, thus justifying a higher-priced out-of-locality attorney.

In particular, the district court concluded that criminal proceedings were expressly contemplated in part because ClearOne, Strohm, and Flood had entered into a Joint

Defense Agreement that expressly referenced "the fact that ClearOne was notified directly by the United States Department of Justice that an investigation was underway, in connection with the SEC action" (R. 2961). In view of this conclusion, it was contradictory for the district court to conclude in a subsequent decision that Strohm's indictment arising out of that same federal grand jury investigation constituted an unusual circumstance justifying a rate greater than the $255 set forth in the Dorsey engagement letter, or the $360 per hour that the district court concluded was reasonable for Marsden in 2007-09.

With respect to this rate issue, Dorsey offered nothing more than the vague and conclusory contentions of their "expert" declarations (R. 1846 ¶ 9 ("Based upon my review and my knowledge and expertise, it is my opinion that the hourly rates charged by each of the Dorsey lawyers in the Criminal Case is a reasonable hourly rate, and that the rates charged by Dorsey are within the range of prevailing market rates charged by other lawyers performing work in Salt Lake City with similar experience, for similar work."); R. 1820 ¶ 8(b) ("I have personally reviewed each of the rates sought, and it is my opinion that they are in line with prevailing rates in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.")).

Nonetheless, the district court summarily rejected the opinion of ClearOne's expert that the rates charged by Wheeler and Snow, Christensen & Martineau ("Snow Christensen") – the Salt Lake City law firm representing Strohm's co-defendant Frances Flood in the criminal proceeding – reflected the rates customarily charged in the locality

for similar services, concluding that Snow Christensen's rates were "arguably too low" (R. 5166).[1]

In view of the foregoing, it was an abuse of discretion for the district court to award rates to out-of-locality attorneys higher than the $360 rate that was found reasonable for Marsden in view of the $255 rate set forth in the 2004 Dorsey engagement letter.

B. Dorsey Charged Travel Expenses, Hotel Costs, and Travel Time that would Not Have Been Necessary if Utah Counsel Had Been Retained

Since Strohm did not need to retain lead trial counsel from Minneapolis, Minnesota, even if such a counsel was retained, it was not reasonable for such counsel to charge Minneapolis rates for a criminal proceeding pending in Salt Lake City, Utah. Moreover, it is not reasonable to charge ClearOne the additional travel and travel-related expenses that Dorsey incurred because Minneapolis counsel needed to travel by air to conduct witness interviews, meet with Strohm, and participate in the trial. Additional travel-related expenses such as rental cars, hotel rooms, and meals also would typically not have been incurred at all if Utah counsel had been assigned to handle Strohm's defense.

The district court held that ClearOne is obligated to pay whatever travel expenses Dorsey incurred because "it does not see a legitimate basis either on general terms, or under the facts of this case, to secondguess the assignment of specific counsel, regardless of where those counsel are located" (R. 5170). This was error for at least two reasons.

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[1] ClearOne's expert was attorney and Professor James R. Holbrook from the University of Utah Law School.

First, Utah law requires that all fees and expenses be reasonable and customary in the locality. Second, ClearOne retained a Salt Lake City attorney Marsden to represent Strohm's interests and reasonably understood that legal services would be performed locally. Contrary to the district court's suggestion that it was somehow ClearOne's burden to "place any restrictions on the identity or geographic location of counsel" (R. 5170), the Dorsey engagement letter never apprised or sought ClearOne's consent for such non-locality travel and related expenses.

C. Dorsey Charged Excessive Hours in Connection with the Criminal Case

Moreover, Dorsey charged excessive hours. While Snow Christensen charged 4,331.75 hours for all timekeepers through verdict, Dorsey charged a whopping 8,199.25 hours for all of its timekeepers through verdict – an unjustifiable 89% more than Snow Christensen. The excessiveness of Dorsey's hours is further described in Professor Holbrook's Declaration:

> Dorsey's case management was unreasonable and resulted in excessive fees (e.g., 27 Dorsey lawyers and 38 Dorsey paraprofessionals have worked on the Criminal Case compared to 8 Snow Christensen lawyers and 9 Snow Christensen paraprofessionals who worked on the Criminal Case). In other words, three times as many Dorsey lawyers and more than four times as many Dorsey paraprofessionals worked on the Criminal Case as compared to Snow Christensen.

(R. 4408 ¶8(f)). The excessive hours charged by Dorsey in the Criminal Case is more specifically detailed in the Declaration of Professor Holbrook (R. 4422-26 ¶¶ 41-47), and will not be repeated here. Suffice it to say that Dorsey has no justification for spending more hours defending Strohm than Snow Christensen spent defending Flood.

XI. IN ITS CIVIL CASE, DORSEY CAN ONLY RECEIVE ATTORNEYS' FEES AND EXPENSES ALLOCABLE TO CLAIMS THAT BOTH AUTHORIZE ATTORNEYS' FEES AND ON WHICH PLAINTIFFS WERE SUCCESSFUL

"[A]ttorney fees in Utah are awarded only as a matter of right under a contract or statute." *Foote v. Clark*, 962 P.2d 52, 54 (Utah 1998). "Fees provided for by contract, moreover, are allowed only in strict accordance with the terms of the contract." *Id.*; *see also IHC Health Servs., Inc. v. D&K Mgmt., Inc.*, 2008 UT 73, ¶ 39, 196 P.3d 588. As the Utah Supreme Court held in the seminal case of *Foote v. Clark*:

> [A] party seeking fees must allocate its fee request according to its underlying claims. Indeed, the party must categorize the time and fees expended for (1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees.

962 P.2d at 55. Despite this clear requirement, Dorsey's attorney fee petition concerning its civil case did not even attempt to "allocate" or "categorize" their attorney fees and expenses between, on the one hand, the two claims on which the district court held that there is an entitlement to reasonable attorney fees – namely, Dorsey's claim for breach of the engagement letter and Strohm's mandatory indemnification claim – and, on the other hand, the 6 or 7 other claims in the Complaint for which no attorney fees are available.[2]

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[2] Plaintiffs' original Complaint dated August 21, 2008 contained one claim for breach of the Dorsey engagement letter and seven other claims on which no attorney fees were available. When Plaintiffs amended their Complaint on July 29, 2009, Plaintiffs added a claim for mandatory indemnification, but still maintained six other claims on which no attorney fees were available.

A. At Most, Dorsey Is Entitled to Recover Reasonable Attorney Fees Allocable to Dorsey's Engagement Letter Claim and Strohm's Statutory Mandatory Indemnification Claim

On November 18, 2009, the district court ruled that, pursuant to Utah's mandatory indemnification statute, "ClearOne shall pay Ms. Strohm's 'reasonable expenses incurred in order to obtain court-ordered indemnification' pursuant to Utah Code Ann. §§ 16-10a-903 and 907(1)" (R. 2993-94 ¶ 1(b)). On March 2, 2010, the district court ruled that "Plaintiffs are also entitled to judgment for interest and fees incurred in seeking recovery under the [Bendinger/Dorsey] letter agreements" (R. 3010). Thus, at most, Dorsey is entitled to reasonable attorney fees and expenses in the civil case only with respect to such fees and expenses in connection with Strohm's mandatory indemnification claim and Dorsey's engagement letter claim.[3]

Rather than requiring Dorsey to allocate its fees among all of the claims asserted by Plaintiffs, the district court improperly relieved Plaintiffs of this duty because, according to the district court, "it would be incorrect to suggest that the Court has not had to consider [Strohm's ETA] and its provisions in reaching its determinations" (R. 5174).[4] However, the issue is not whether the Court considered Strohm's ETA. The law, as correctly stated but misapplied by the district court, is that "'a prevailing party may

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[3] If the Court agrees with ClearOne that Dorsey is not entitled to attorney fees in connection with its *pro se* breach of engagement letter claim, then Strohm is entitled to civil fees only in connection with her statutory mandatory indemnification claim.

[4] Strohm asserted in both her original and amended complaint a claim contending that ClearOne breached her Employment Termination Agreement ("ETA") (R. 25 ¶¶ 78-84) – a claim on which there was significant motion practice and document and deposition discovery. Not only did Strohm not prevail on her ETA claim, but there is no entitlement to attorney fees on said claim. Thus, it was erroneous for the district court to require ClearOne to pay Dorsey's attorney fees on the ETA claim merely because it found it had to consider that agreement.

collect attorney fees on noncompensable claims only if those claims substantially overlap with compensable claims'" (R. 5174 (quoting *Jensen v. Sawyers*, 2005 UT 81, ¶ 128, 130 P.3d 325)).

In the instant case, Plaintiffs' seven noncompensable claims do not "substantially overlap" with their two compensable claims, even though they all seek to result in payment to Dorsey.[5] Plaintiffs' ETA claim involved the interpretation of an indemnification provision imposing Utah statutory and bylaws limitations. In contrast, the Dorsey engagement letter claim involved a separate and independent contract that the district court held was ambiguous. Plaintiffs' promissory estoppel and unjust enrichment claims also involve discrete elements and an analysis of separate factual issues. Moreover, since the Dorsey engagement letter entitlement to attorney fees must be strictly construed, its provision calling for attorney fees "expended in connection with collecting amounts due under this Agreement" cannot be construed to cover legal fees expended in prosecuting Plaintiffs' remaining claims.

While Plaintiffs are, at best, only entitled to fees and costs in connection with these two claims, Plaintiffs' original and amended Complaints in this action contained eight claims. In fact, Strohm's mandatory indemnification claim was not added until July 29, 2009 – five months after the February 27, 2009 verdict. Moreover, the motions, briefing, hearings, and discovery in this action involved significant issues other than the

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[5] Plaintiffs' original complaint included claims for declaratory relief under the Utah Code, injunctive relief, Strohm's ETA breach claim, Dorsey's engagement letter breach claim, unjust enrichment, promissory estoppel, indemnification under the Utah Code, and breach of the covenant of good faith and fair dealing (R. 22-30).

Dorsey engagement letter and Strohm's subsequent mandatory indemnification claim. Indeed, no discovery was needed for the mandatory indemnification claim.

B. Only Two Depositions – and None of the Discovery Documents – Were Relevant to the Dorsey Engagement Letter Claim

Significantly, Dorsey researched and drafted the original Complaint to support eight theories of recovery – only one of which carries any potential entitlement to attorney fees. ClearOne moved to dismiss the entire Complaint and Dorsey cross-moved for summary judgment on the Dorsey engagement letter claim. The parties extensively briefed these motions, and the Court ultimately denied both in December 2008. While Dorsey sought expedited discovery, very little document discovery – and no depositions – occurred until after the criminal jury's verdict. Indeed, since Dorsey moved for summary judgment on its engagement letter claim almost immediately, Dorsey must not have believed that discovery was necessary for such claim at that time.

On the eve of the criminal trial, Plaintiffs sought injunctive relief to compel ClearOne to pay Dorsey's fees and expenses, but the Court denied injunctive relief, except for certain evidentiary-gathering expenses allegedly needed to support Strohm's defenses. While Plaintiffs represented to the Court in the civil case that Strohm urgently needed the testimony of a witness in Australia, no such witness or testimony was ever introduced at the criminal trial.

One of the primary issues in dispute between the parties before the verdict was the meaning of Strohm's Employment Termination Agreement – a claim that does not carry attorney fees. Plaintiffs also sought to press their promissory estoppel and unjust enrichment claims by asserting ClearOne's history of SEC filings and budgeting of

anticipated attorney fees in the Criminal Case – issues also not relevant to the original intent of the Dorsey engagement letter.

After the verdict, Plaintiffs pressed for extensive deposition and document discovery, but then amended their complaint and moved for summary judgment on Strohm's mandatory indemnification claim – a claim on which no discovery was necessary. In October 2009 – a month during which almost 19% of Dorsey's Civil Case charges were incurred – Plaintiffs deposed former co-CEO Keough, ClearOne's current Information Technology Manager Josh Ihrig, prior counsel Jefferson Gross ("Gross"), ClearOne Board members Larry Hendricks, Scott Huntsman, and Brad Baldwin, and ClearOne's outside auditor Mark Low. Plaintiffs' demands for additional depositions were ultimately dropped. ClearOne deposed only one witness: Marsden. Extensive documentary evidence involving expensive and time-consuming e-discovery also ensued.

Only two of the deposition witnesses testified about the Dorsey engagement letter. No additional documents relating to the Dorsey engagement letter were uncovered. On the ClearOne side, Keough was the only witness who knew anything about it. Keough also testified about Strohm's Employment Termination Agreement, his recollection of Board meetings and the Special Litigation Committee, and his departure from ClearOne. On the Dorsey side, Marsden testified minimally about the engagement letters: he drafted them, sent them to ClearOne (he did not remember how), and they each came back signed without any discussion or negotiation. Thus, while ClearOne does not dispute that some of the deposition discovery was relevant to Dorsey's engagement letter

claim, it was a relatively small part of the territory covered at the eight depositions that were taken.

C. Dorsey Engaged in Wasteful Discovery Practices

Dorsey engaged in wasteful discovery practices. Even if such practices are not sanctionable, they should not, at the very least, be compensable. Dorsey insisted upon taking the depositions of three ClearOne Board members and one outside auditor – none of whom could shed any light on the original understanding of the Dorsey engagement letter. In addition, in response to Plaintiffs' 30(b)(6) deposition notice, attorney Jefferson Gross was produced to discuss the negotiation history of Strohm's ETA, and Josh Ihrig was produced to discuss ClearOne's information technology practices. Whatever benefit Dorsey may claim it derived from these depositions concerning Plaintiffs' declaratory judgment, Employment Termination Agreement, promissory estoppel, unjust enrichment, statutory (non-mandatory) indemnification, and good faith and fair dealing claims, there can be no dispute that these witnesses had no relevant knowledge of the Dorsey letter.

Dorsey continued its practice of flying attorneys in from Minneapolis to take depositions in Salt Lake City. Most of Plaintiffs' depositions were conducted or defended by Minneapolis attorneys. In fact, Marsden's October 14, 2009 deposition was defended by one of Dorsey's Minneapolis litigators, Shaheen, with Michael also in attendance. Michael billed 9.4 hours, Marsden billed 9.5 hours, and Shaheen billed 10 hours on that day. Indeed, Michael's entire role in the civil case appears to be duplicative and unnecessary. Other than Michael's declaration in this case concerning the timekeepers involved in the Criminal Case, it is entirely unclear why Michael – co-chair

of Dorsey's White Collar Crime and Civil Fraud practice group (R. 3152 ¶ 3) – billed significant amounts of time to the Civil Case at all. Charging 152.8 hours to the civil case to date – at an average rate of $583 per hour – there appears to be no substantive task that he performed that was not duplicative of what other Dorsey attorneys were also doing. Plaintiffs' Petition failed to demonstrate what value Michael added to the civil case. Nor should ClearOne be required to pay for his attendance – not to mention his charged travel time and travel-related expenses – at hearings in Utah during which Michael played no substantive role and appeared to be only an observer.

The district court erroneously disregarded all of the above, ruling only that the entirety of Dorsey's civil fees should be reduced by 5% because of Dorsey's equitable claims (R. 5174-75). Since Dorsey is not entitled to attorney fees or costs that are allocable to noncompensable claims on which it did not prevail, the district court's judgment should be vacated to the extent that it awards such fees and costs.

D. Dorsey is Not Entitled to Attorney Fees For its Unsuccessful Motions or for Unnecessary Work

Prevailing parties are not entitled to recover attorney fees incurred on prior unsuccessful summary judgment motions. *See Gilbert Dev. Corp. v. Wardley Corp*, 2010 UT App 361, ¶ 52, 246 P.3d 131 ("If attorney fees are recoverable by contract, a party is entitled only to those fees attributable to the successful vindication of contractual rights." . . . Accordingly, we reverse the trial court's attorney fees award and remand with instructions to subtract the fees incurred pursuing the unsuccessful motion for summary judgment." (additional quoations and citations omitted)). Therefore, Dorsey is not

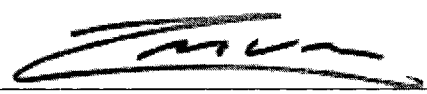
entitled to attorney fees concerning its unsuccessful summary judgment motions, its unsuccessful motion for advancement, and its unsuccessful motion for an injunction.

CONCLUSION

For all of the foregoing reasons, ClearOne respectfully requests that the Judgment of the district court be vacated in its entirety. Specifically, the award of 18% and civil attorney fees and costs should be vacated and, at a minimum, the criminal attorney fees and costs should be reduced to reflect Utah rates.

DATED this 13th day of October, 2011.

MAGLEBY & GREENWOOD, P.C.



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ClearOne Communications Inc.

CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law firm of MAGLEBY & GREENWOOD, P.C., 170 South Main Street, Suite 850, Salt Lake City, Utah 84101, and that pursuant to Rule 5(b), Utah Rules of Civil Procedure, a true and correct copy of the foregoing **APPELLANT'S BRIEF** was delivered to the following this 13th day of October, 2011 by:

[ ] Hand Delivery

[X] Depositing the same in the U.S. Mail, postage prepaid

[X] Electronic Mail

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ADDENDA

ADDENDA

Addendum 1

1 of 5 DOCUMENTS

UTAH CODE ANNOTATED

*** Statutes current through the 2011 2nd Special Session. ***
*** Annotations current through 2011 UT 51 (08/23/2011); 2011 UT App 294 (09/01/2011) and September 1, 2011 (Federal Cases). ***

TITLE 16. CORPORATIONS
CHAPTER 10a. UTAH REVISED BUSINESS CORPORATION ACT
PART 9. INDEMNIFICATION

Go to the Utah Code Archive Directory

Utah Code Ann. § 16-10a-902 (2012)

§ 16-10a-902. Authority to indemnify directors

(1) Except as provided in Subsection (4), a corporation may indemnify an individual made a party to a proceeding because he is or was a director, against liability incurred in the proceeding if:

(a) his conduct was in good faith; and

(b) he reasonably believed that his conduct was in, or not opposed to, the corporation's best interests; and

(c) in the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful.

(2) A director's conduct with respect to any employee benefit plan for a purpose he reasonably believed to be in or not opposed to the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of Subsection (1)(b).

(3) The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this section.

(4) A corporation may not indemnify a director under this section:

(a) in connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or

(b) in connection with any other proceeding charging that the director derived an improper personal benefit, whether or not involving action in his official capacity, in which proceeding he was adjudged liable on the basis that he derived an improper personal benefit.

(5) Indemnification permitted under this section in connection with a proceeding by or in the right of the corporation is limited to reasonable expenses incurred in connection with the proceeding.

HISTORY: C. 1953, 16-10a-902, enacted by L. 1992, ch. 277, § 109.

Addendum 2

1 of 4 DOCUMENTS

UTAH CODE ANNOTATED

*** Statutes current through the 2011 2nd Special Session. ***
*** Annotations current through 2011 UT 51 (08/23/2011); 2011 UT App 294 (09/01/2011) and September 1, 2011 (Federal Cases). ***

TITLE 16. CORPORATIONS
CHAPTER 10a. UTAH REVISED BUSINESS CORPORATION ACT
PART 9. INDEMNIFICATION

Go to the Utah Code Archive Directory

Utah Code Ann. § 16-10a-903 (2012)

§ 16-10a-903. Mandatory indemnification of directors

Unless limited by its articles of incorporation, a corporation shall indemnify a director who was successful, on the merits or otherwise, in the defense of any proceeding, or in the defense of any claim, issue, or matter in the proceeding, to which he was a party because he is or was a director of the corporation, against reasonable expenses incurred by him in connection with the proceeding or claim with respect to which he has been successful.

HISTORY: C. 1953, 16-10a-903, enacted by L. 1992, ch. 277, § 110.

Addendum 3

1 of 2 DOCUMENTS

UTAH CODE ANNOTATED

*** Statutes current through the 2011 2nd Special Session. ***
*** Annotations current through 2011 UT 51 (08/23/2011); 2011 UT App 294 (09/01/2011) and September 1, 2011 (Federal Cases). ***

TITLE 16. CORPORATIONS
CHAPTER 10a. UTAH REVISED BUSINESS CORPORATION ACT
PART 9. INDEMNIFICATION

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Utah Code Ann. § 16-10a-905 (2012)

§ 16-10a-905. Court-ordered indemnification of directors

Unless a corporation's articles of incorporation provide otherwise, a director of the corporation who is or was a party to a proceeding may apply for indemnification to the court conducting the proceeding or to another court of competent jurisdiction. On receipt of an application, the court, after giving any notice the court considers necessary, may order indemnification in the following manner:

(1) if the court determines that the director is entitled to mandatory indemnification under *Section 16-10a-903*, the court shall order indemnification, in which case the court shall also order the corporation to pay the director's reasonable expenses incurred to obtain court-ordered indemnification; and

(2) if the court determines that the director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not the director met the applicable standard of conduct set forth in *Section 16-10a-902* or was adjudged liable as described in *Subsection 16-10a-902(4)*, the court may order indemnification as the court determines to be proper, except that the indemnification with respect to any proceeding in which liability has been adjudged in the circumstances described in *Subsection 16-10a-902(4)* is limited to reasonable expenses incurred.

HISTORY: C. 1953, 16-10a-905, enacted by L. 1992, ch. 277, § 112.

Addendum 4

2 of 3 DOCUMENTS

UTAH CODE ANNOTATED

*** Statutes current through the 2011 2nd Special Session. ***
*** Annotations current through 2011 UT 51 (08/23/2011); 2011 UT App 294 (09/01/2011) and September 1, 2011 (Federal Cases). ***

TITLE 16. CORPORATIONS
CHAPTER 10a. UTAH REVISED BUSINESS CORPORATION ACT
PART 9. INDEMNIFICATION

Go to the Utah Code Archive Directory

Utah Code Ann. § 16-10a-907 (2012)

§ 16-10a-907. Indemnification of officers, employees, fiduciaries, and agents

Unless a corporation's articles of incorporation provide otherwise:

(1) an officer of the corporation is entitled to mandatory indemnification under *Section 16-10a-903*, and is entitled to apply for court-ordered indemnification under *Section 16-10a-905*, in each case to the same extent as a director;

(2) the corporation may indemnify and advance expenses to an officer, employee, fiduciary, or agent of the corporation to the same extent as to a director; and

(3) a corporation may also indemnify and advance expenses to an officer, employee, fiduciary, or agent who is not a director to a greater extent, if not inconsistent with public policy, and if provided for by its articles of incorporation, bylaws, general or specific action of its board of directors, or contract.

HISTORY: C. 1953, 16-10a-907, enacted by L. 1992, ch. 277, § 114.

Addendum 5

EMPLOYMENT TERMINATION AGREEMENT

This Employment Termination Agreement ("Agreement") is entered into by and between ClearOne Communications, Inc. ("ClearOne" or the "Company") and Susie S. Strohm ("Strohm") (ClearOne and Strohm shall sometimes be hereinafter referred to collectively as the "Parties").

RECITALS

A. Strohm has been employed by ClearOne in a variety of positions, most recently as the Company's Chief Financial Officer.

B. On January 15, 2003, the United States Securities and Exchange Commission filed a civil action against ClearOne, Strohm, and Frances M. Flood, who was then serving as the Company's Chief Executive Officer, alleging various improprieties and misstatements in connection with the Company's financial statements (the "SEC Action").

C. The filing of the SEC Action has spawned, and may continue to spawn, multiple related proceedings, including, but not limited to, multiple shareholder securities class actions, multiple shareholder derivative actions, a grand jury investigation being conducted by the United States Department of Justice, a dispute and potential litigation between the Company and its directors and officers liability insurers, and potential litigation between the Company and its former auditor, Ernst & Young (collectively, "Related Proceedings").

D. Soon after the filing of the SEC Action, the Company placed Strohm on a paid administrative leave of absence, and this paid administrative leave has continued in effect at all times up to the execution of this Agreement.

E. Strohm has employed separate counsel, Milo Steven Marsden and the law firm of Bendinger, Crockett, Peterson & Casey, PC (collectively, "BCP&C"), to defend her in the SEC Action and the Related Proceedings. BCP&C has also represented Strohm in connection with the negotiation and drafting of this Agreement.

F. Strohm has made various demands on the Company for indemnification and for advancement of the attorneys' fees and costs she has incurred to date, as well as the attorneys' fees and costs she may subsequently incur, in connection with the SEC Action and the Related Proceedings and has provided the Company with written undertakings, dated August 29, 2003 and September 3, 2003, in conformity with the requirements of Utah Code Ann. § 16-10a-904.

G. ClearOne referred Strohm's demands for indemnification to its Special Litigation Committee ("SLC") comprised of two independent directors. The SLC reviewed those demands, as well as similar demands for indemnification made by other present or former officers and directors of the Company, in conjunction with its investigation of the various claims asserted in the multiple shareholder derivative actions filed against certain of the Company's present and former officers and directors, including Strohm. On October 13, 2003, the SLC completed its investigation concerning the derivative actions and the indemnification demands and issued its reports to the Company wherein it concluded, inter alia, that pursuing the derivative actions was not in the best interest of the Company and that the Company should attempt to negotiate a

settlement of Strohm's indemnification demands in the context of negotiating a global settlement of all potential claims and counterclaims between the Company and Strohm. In reliance on the SLC's conclusions and recommendations, the Company has moved to dismiss the derivative actions pursuant to Utah Code Ann. § 16-10a-740(4)(a) and has negotiated this Agreement with Strohm.

H. Strohm and ClearOne desire to resolve any and all disputes that may exist between them, whether known or unknown, including, but not limited to, disputes regarding Strohm's demand for indemnification, disputes relating to Strohm's employment with ClearOne, and disputes relating to the termination of that employment relationship.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual promises, covenants, warranties, and agreements set forth herein, the Parties mutually agree as follows:

1. Effective Date. This Agreement is effective on the eighth day following Strohm's signing of this Agreement, provided that Strohm does not revoke her execution of this Agreement as provided in Paragraph 19 below.

2. Receipt of this Agreement. Strohm acknowledges that she received a copy of this Agreement on December 2, 2003, and that she has 21 days from the receipt of this Agreement in which to consider and consult with an attorney regarding this Agreement. Strohm further acknowledges that she has had an adequate amount of time in which to consult with BCP&C, her counsel of choice, with respect to the contents of this Agreement prior to signing.

3. Payment to Strohm. Upon the expiration of the revocation period described in Paragraph 19 below and the unrevoked signing of this Agreement by Strohm, ClearOne shall pay Strohm the sum of $75,000. The Parties acknowledge and agree that this payment is being made in consideration of, inter alia, the Company's purchase of Strohm's shares of the Company's common stock, the Company's cancellation of Strohm's options to purchase additional shares of the Company's common stock, and the release of all claims that Strohm may have against the Company, all as more fully stated in Paragraphs 5, 6, and 9 below. The Parties also acknowledge and agree that the Company is not responsible for the withholding of any federal or state taxes from said payment and that Strohm is responsible for paying any taxes that may become due and owing as a result of her receipt of said payment.

4. Resignation of Employment. Strohm hereby resigns her employment with ClearOne effective December 5, 2003.

5. Cancellation of Stock Options. As partial consideration for the payment specified in Paragraph 3 above, upon the expiration of the revocation period described in Paragraph 19 below and the unrevoked signing of this Agreement by Strohm, all unexercised stock options acquired by Strohm during her employment with the Company, whether vested or unvested, shall immediately be deemed cancelled. Strohm represents and warrants that, immediately prior to the effective date of this Agreement, she holds vested and unvested stock options entitling her to purchase up to a total of 268,464 shares of the Company's common stock and that 171,963 of these options are vested. Strohm further agrees that all of her rights, entitlements, and benefits

under the 1990 Gentner Stock Option Plan and the 1998 ClearOne Stock Option Plan, including any agreements entered into in relation to the foregoing plans, are hereby terminated and cancelled.

6. Transfer of Stock. As partial consideration for the payment specified in Paragraph 3 above, upon the expiration of the revocation period described in Paragraph 19 below and the unrevoked signing of this Agreement by Strohm, Strohm shall transfer, assign, and sell to the Company 15,500 shares of the Company's common stock.

7. Cooperation in Related Proceedings. Strohm shall cooperate with the Company and its counsel in the defense and/or prosecution of the SEC Action and the Related Proceedings. Strohm's cooperation shall include, but shall not be limited to, voluntarily providing deposition and trial testimony, meeting with the Company and its counsel for the purpose of preparing for depositions or trial proceedings, and providing information and documents to the Company or its counsel in connection with the defense and/or prosecution of the SEC Action and the Related Proceedings. With respect to any request by the Company and/or its counsel for deposition or trial testimony, meetings, information, or documents, the Company shall give reasonable notice to Strohm of its request, including the time and place of the deposition, trial, or meeting, and shall reimburse Strohm for all reasonable expenses incurred by her, including reasonable attorneys' fees and costs, in providing the requested cooperation.

8. Indemnification. Subject to the limitations imposed by Utah Code Ann. § 16-10a-902 and the Company's articles of incorporation and bylaws, and also subject to the undertakings referred to in Recital F above, ClearOne shall indemnify Strohm for any liability and for all reasonable attorneys' fees and costs incurred by her in connection with the SEC Action or any Related Proceedings, whether incurred before or after the effective date of this Agreement. The Company's duty to indemnify Strohm is further conditioned upon Strohm's fulfillment of her duty under Paragraph 7 above to cooperate with the Company and its counsel in connection with the SEC Action and Related Proceedings.

9. Release of Claims by Strohm. Strohm, on behalf of herself and her heirs and assigns, hereby completely releases and discharges ClearOne and all of ClearOne's predecessors, successors, parents, subsidiaries, and affiliates, and all of their respective present and former directors, officers, employees, attorneys and agents (hereinafter collectively referred to as "Releasees") from any and all existing claims and causes of action of every kind and nature, whether presently known or unknown by the Parties, including but not limited to any claims or causes of action for breach of implied or express contract, libel, slander, wrongful discharge or termination, discrimination claims under the Age Discrimination in Employment Act and/or Older Workers Benefit Protection Act, Title VII of the Civil Rights Act of 1964, as amended, the Utah Antidiscrimination Act, local laws prohibiting age, race, religion, sex, national origin, disability and other forms of discrimination, or any other federal or state law that may be applicable thereto, claims growing out of any legal restrictions on ClearOne's right to terminate its employees, any tort claim or other claim arising in any way out of the employment relationship between Strohm and ClearOne or the termination of that relationship. Strohm specifically waives any and all claims for back pay, front pay, or any other form of compensation for services, except as set forth herein.

Except as expressly stated in Paragraph 8 above, Strohm hereby waives any right to recover damages, costs, attorneys' fees, and any other relief in any proceeding or action brought against ClearOne by any other party, including without limitation the Equal Employment Opportunity Commission and the Utah Antidiscrimination and Labor Division, on Strohm's behalf asserting any claim, charge, demand, grievance, or cause of action released by Strohm as stated above.

Notwithstanding the foregoing, Strohm does not waive rights, if any, Strohm may have to unemployment insurance benefits or workers' compensation benefits. Nothing in this Paragraph 9 prohibits Strohm from paying COBRA premiums to maintain Strohm's participation, if any, in ClearOne's group health plan to the extent allowed by law and by the terms, conditions, and limitations of the health plan.

10. Release of Claims by ClearOne. Except for any claim as to which indemnification is not allowed by Utah Code Ann. § 16-10a-902 and any claim that may accrue under the undertakings referenced in Recital F above, ClearOne, on behalf of itself and its successors and assigns, hereby completely releases and discharges Strohm from all existing claims and causes of action of any kind and nature, whether presently known or unknown by the Parties, including but not limited to any claims or causes of action arising out of or relating to Strohm's employment with ClearOne.

11. No Assignment of Claims. Strohm represents and warrants that she has not previously assigned or transferred, or attempted to assign or transfer, to any third party, any of the claims waived and released herein.

12. No Claim Filed. Strohm represents that she has not filed any claim, complaint, charge, or lawsuit against ClearOne or any other Releasee with any governmental agency or any state or federal court, and covenants not to file any lawsuit at any time hereafter for any matter, claim, or incident known or unknown which occurred or arose out of occurrences prior to the date hereof.

13. No Admission of Liability. This Agreement does not constitute an admission of any fault, liability, or wrongdoing by any Releasee, nor an admission that Strohm has any claim whatsoever against ClearOne or any other Releasee. ClearOne and all other Releasees specifically deny having any liability to Strohm or having committed any wrongful acts against Strohm. This Agreement does not constitute an admission of any fault, liability, or wrongdoing by Strohm, nor an admission that ClearOne has any claim against Strohm. Strohm specifically denies having any liability to ClearOne or having committed any wrongful acts against ClearOne.

14. Additional Consideration. Strohm acknowledges and agrees that as of the date she signs this Agreement, ClearOne has paid to Strohm (a) all compensation for wages earned, less normal payroll deductions, (b) all amounts due for earned vacation pay less normal payroll deductions, and (c) all other amounts due and owing to Strohm by ClearOne. Strohm agrees and acknowledges that the sums paid pursuant to this Agreement are in addition to any sums or payments to which Strohm would be entitled but for the signing of this Agreement.

15. Conditions Subsequent. This Agreement is conditioned upon Strohm signing settlement documents in the SEC Action by December 5, 2003, and upon the final approval of the settlement of the SEC Action, as it applies to Strohm, by January 31, 2004. If for any reason Strohm fails to satisfy either of these conditions, this Agreement will automatically become null and void, and the Parties shall forthwith return to each other any and all consideration received by them pursuant to this Agreement.

16. Integration Clause. This Agreement contains the entire agreement and understanding of ClearOne and Strohm concerning the subject matter hereof, and except as expressly noted herein, this Agreement supersedes and replaces all prior negotiations, proposed agreements, agreements or representations whether written or oral concerning the subject matter hereof. ClearOne and Strohm agree and acknowledge that neither ClearOne or Strohm, nor any agent or attorney of either, has made any representation, warranty, promise or covenant whatsoever, express or implied, not contained in this Agreement, to induce the other to execute this Agreement. No amendment, alteration, or modification of this Agreement shall be effective unless made in writing and signed by both Parties.

17. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Utah, without giving effect to Utah's choice of law rules.

18. Voluntary and Knowing Signing. Strohm acknowledges that she has read this Agreement carefully and fully understands this Agreement and that she has consulted with her attorney, BCP&C, prior to signing this Agreement. Strohm acknowledges that she has executed this Agreement voluntarily and of her own free will and that she is knowingly and voluntarily releasing and waiving all claims she may have against Releasees, including ClearOne.

19. Revocation Period. Strohm has seven (7) days from the date on which she signs this Agreement to revoke this Agreement by providing written notice, by mail, hand delivery, or facsimile, of her revocation to:

Raymond J. Etcheverry
Parsons Behle & Latimer
Counsel for ClearOne
201 South Main Street
Suite 1800
Salt Lake City, Utah 84111
Facsimile: (801) 536-6111

Strohm's revocation, to be effective, must be received by the above-named person by the end of the seventh day after Strohm signs this Agreement. This Agreement becomes effective on the eighth day after Strohm signs this Agreement, providing that Strohm has not revoked this Agreement as provided above.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the dates indicated below.

CLEARONE COMMUNICATIONS, INC.

Dated: 12/5/03

By: _____

Its: CEO

Dated: 12/2/03

_____

SUSIE S. STROHM

Addendum 6

LAW OFFICE
BENDINGER, CROCKETT, PETERSON & CASEY, PC
A PROFESSIONAL CORPORATION
170 SOUTH MAIN, SUITE 400
SALT LAKE CITY UTAH 84101-3636

TELEPHONE
(801) 533-8383
FACSIMILE
(801) 533-8686
E-MAIL
info@bcpclaw.com

GARY F BENDINGER
STEPHEN G CROCKETT
ROBERT A PETERSON
RICHARD W CASEY
MILO STEVEN MARSDEN
JEFFERY S WILLIAMS
WESLEY D FELIX
JOHN M BOGART
REBECCA B PARR
LISA R PETERSEN
EVELYN J FURSE
KAREN L MARTINEZ
CHERYL MORI-ATKINSON
SCOTT E WARNICK
RYAN B FRAZIER

OF COUNSEL
ROGER D SANDACK
PATRICIA A O'ROURKE
SEAN N EGAN
ROBERT J MOORE

January 29, 2003

Mr. Greg Rand, Co-CEO
Mr. Mike Keough, Co-CEO
Ms. Susie S. Strohm
ClearOne Communications, Inc.
1825 Research Way
Salt Lake City, Utah 84119

Re: SEC v. Clearone Communications, Inc., Frances M. Flood, and Susie Strohm

Dear Greg, Mike and Susie:

This letter will summarize and confirm the agreement for my firm, Bendinger, Crockett, Peterson & Casey to represent Susie Strohm's interests in connection with the SEC civil complaint, referenced above, and in connection with further related investigations and litigation.

1. Purpose of Employment -- Subject to the terms and conditions set forth below, my firm will render legal services to Ms. Strohm in connection with the above matters.

2. Retainer -- Our agreement to represent Ms. Strohm is subject to Clearone Communications, Inc.'s ("Clearone") payment of a retainer totaling $5,000. The retainer fee shall be held in trust by us and shall be used to pay the last fees incurred under this agreement. In the event the $5,000 is more or less than is owed, we will either bill or refund the difference.

3. Billing -- We will provide Ms. Strohm with a bill each month for all fees, charges and other expenses (such as long distance telephone calls, copying costs, postage, filing fees, deposition costs, travel expenses, expert witness fees and similar expenses), determined in accordance with this Agreement.

Clearone will pay the full amount of our bill within thirty days after receipt. Any amount billed and unpaid after such thirty day period shall bear and accrue interest at the rate of 18% per annum from the date billed until paid. The accrual and payment of interest on unpaid balances shall not affect our right to withdraw in the event of non-payment as provided in paragraphs below. Under Utah law, we have a lien on your causes of action in this lawsuit for the payment

of fees under this Agreement. Ms. Strohm and Clearone agree to be jointly and severally responsible for payment of all amounts billed under this Agreement.

Notwithstanding the above, Clearone understands and accepts that all my firm's professional responsibilities under applicable law are owed solely to Ms. Strohm.

4. Rates and Staffing -- We shall be entitled to decide who the appropriate firm employee is for any particular task. Your billing shall be based on the normal hourly rates charged for employees of this firm who work on this matter. I will be primarily responsible for Ms. Strohm's representation. My hourly rate is presently $255 per hour. However, I have agreed to discount my hourly rate by ten (10) percent under this Agreement. The rates we charge are reviewed and adjusted annually. Our next review will occur at the end of this year.

5. Withdrawal for Non-payment of Bills -- In the event you fail to pay the charges and expenses on a current basis as provided in paragraph 3, we reserve, and you agree that we have the absolute right to withdraw from this representation. Written notification of withdrawal under this paragraph shall be provided to you and you shall be granted a five day period to cure any such non-payment prior to withdrawal. You agree that we remain entitled to our full accrued fee, notwithstanding that we withdraw or you discharge us and obtain substitute counsel before we have completed all assignments under this agreement.

6. Withdrawal -- We reserve the right to withdraw from this matter for any just reason as permitted or required under the Utah Rules of Professional Conduct or as permitted by the Rules of the Courts of the State of Utah. You agree to our withdrawal under such circumstances.

7. Attorney Fees -- In the event of termination of this Agreement, we shall be entitled to receive billed or unbilled fees, costs, and expenses incurred in this matter. In addition, we shall be entitled to recover all reasonable costs expended in connection with collecting amounts due under this Agreement, including reasonable attorneys' fees.

8. Conflicts – No conflict of interest is created by my firm's representation of Ms. Strohm, and should a potential conflict arise, Ms. Strohm agrees to waive the same, if appropriate.

If the foregoing correctly sets forth our agreement and understanding with respect to these

matters, please acknowledge the same by signing below, and by returning the executed original, with your retainer check to me. We look forward to representing you in this matter.

Sincerely yours,

Milo Steven Marsden

AGREED AND ACCEPTED:

Clearone Communications, Inc.

By: _____
Its: _____

By: Susie Strohm
Susie S. Strohm

F:\USERS\MSM\Strohm\Agreement.wpd

Addendum 7

DORSEY

MILO STEVEN MARSDEN
Phone: (801) 933-8944
Fax: (801) 933-7373
marsden.steve@dorsey.com

March 31, 2004

Mr. Michael Keough, CEO
ClearOne Communications, Inc.
1825 Research Way
Salt Lake City, Utah 84119

Ms. Susie S. Strohm
2158 Mesa Circle
Sandy, UT 84092

Re: SEC v. Clearone Communications, Inc., Frances M. Flood, and Susie Strohm

Dear Mike and Susie:

As you know, I recently left the law firm of Bendinger, Crockett, Peterson & Casey, and joined the law firm of Dorsey & Whitney LLP. Our engagement agreement needs to be updated to reflect this move. The rest of this letter is intended to serve as the update.

In particular, this letter confirms your engagement of Dorsey & Whitney, LLP ("the firm") to represent Susie Strohm in connection with the SEC civil complaint, referenced above, and in connection with further related investigations and litigation including, among others, Anderton v. ClearOne Communications, Inc., et al., Master File No. 2:03-CV-0062-PGC; John Gorey, IRA v. Frances Flood, et al., Civil No. 030918066; and E-Bond Epoxies, Inc. Profit Sharing Plan and Trust v. Frances Flood et al., Civil No. 030906061. This letter further confirms our discussions and agreements about our services and charges.

1. **Services**. We will provide legal services for and on behalf of Susie Strohm in connection with the above-described matters.

2. **Fees, Disbursements and Billing**. Our fees are ordinarily based primarily on our usual and customary hourly rates. My current hourly rate is $255 Our hourly rates are subject to adjustment from time to time. Our fees may also be affected by factors such as the amount involved in the representation, unusual time constraints, use of prior work product, and overall value of the services.

DORSEY

Disbursements for certain items, such as filing fees, travel expenses and long distance calls are usually advanced by us, then billed to clients. We sometimes ask providers, such as court reporter, expert witnesses or filing services, to submit certain substantial charges directly to clients. Our service charges for such items as computerized research will be billed at our own costs, direct and indirect. Facsimile service and photocopying will be billed at $.50 and $.20 per page, respectively. Long distance telephone and facsimile transmission costs are in addition to the per page fax costs. We will submit monthly statements, describing services performed, and stating fees and other charges and total discounts. Payment will be due on receipt.

Ms. Strohm and Clearone agree to be jointly and severally responsible for payment of all amounts billed under this Agreement. Notwithstanding the above, Clearone understands and accepts that all my firm's professional responsibilities under applicable law are owed solely to Ms. Strohm.

3. **Other Representations**. We request that a signed copy of this letter be returned to indicate agreement that while this firm is representing Ms. Strohm: (1) the firm may represent other clients on unrelated matters which may be adverse to Ms. Strohm, and (2) with respect to any parties who may be adverse to Ms. Strohm during our representation of Ms. Strohm, we may represent such parties on unrelated matters. These agreements are made on the following understandings. First, the firm will not use confidential client information against Ms. Strohm and second, while the firm represents Ms. Strohm the firm will not undertake litigation in which Ms. Strohm is a directly adverse party.

4. **Completing Our Services**. We intend and expect to complete our services to your satisfaction. However, we will withdraw from representation upon your request. We may also withdraw if our fees are not paid timely or for a reason required or permitted by professional rules.

We greatly appreciate the opportunity to be of service. If there are any questions about our services, or the fee and billing arrangements, please call me.

Sincerely yours,

DORSEY & WHITNEY LLP

Milo Steven Marsden

AGREED AND ACCEPTED:

Clearone Communications, Inc.

By: _____
Its: CEO

By: _____
Susie S. Strohm

AGREED AND ACCEPTED:

Clearone Communications, Inc.

By: _____
Its: _____

By: Susie Strohm
Susie S. Strohm

Addendum 8

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

SUSIE STROHM and DORSEY & WHITNEY, LLP, **Plaintiffs,** **v.** **CLEARONE COMMUNICATIONS, INC.,** **Defendant.**	**ORDER–INDEMNIFICATION** **Civil No. 080917500** **Honorable Robert K. Hilder**

On Monday, October 26, 2009, the Honorable Robert K. Hilder presided over oral argument on the following motions: (i) Plaintiffs' Motion for Partial Summary Judgment (filed August 12, 2009); and (ii) Defendant's Cross-Motion for Summary Judgment as to Defendant's First Counterclaim for Relief (filed September 15, 2009). Counsel for the parties appeared in person and via telephone. Plaintiffs Susie Strohm ("Ms. Strohm") and DORSEY & WHITNEY, LLP ("Dorsey") were represented by Milo Steven Marsden and Cameron M. Hancock of DORSEY & WHITNEY, LLP. Defendant ClearOne Communications, Inc. ("ClearOne") was represented by Brian S. Cousin and Neil A. Capobianco of SEYFARTH SHAW LLP.

Based on the pleadings and papers on file with the Court, the arguments of counsel at the hearing, the undisputed material facts, and Utah Code Ann. § 16-10a-901 *et seq.*, for good cause shown, and for the reasons stated on the record during the October 26, 2009 hearing, the Court hereby GRANTS and DENIES the motions as follows:

1. The Court GRANTS Plaintiffs' Motion for Partial Summary Judgment and orders that:

a. Mandatory Indemnification: Under Utah Code Ann. §§ 16-10a-903 and 907, ClearOne shall indemnify Ms. Strohm for the "reasonable expenses incurred by h[er] in connection with the proceeding or claim[s] with respect to which [s]he has been successful." Specifically, Ms. Strohm successfully defended herself against seven of the eight Counts ("claims") alleged against her by the United States in the federal criminal proceeding styled *United States* v. Flood, et. al. in the United States District Court for the District of Utah (Case No. 07-00485); and

b. Expenses to Obtain Indemniication: Pursuant to Utah Code Ann. § 16-10a-905(1), ClearOne shall pay Ms. Strohm's "reasonable expenses incurred in order to obtain court-ordered indemnification," pursuant to Utah Code Ann. §§ 16-10a-903 and 907(1).

2. The Court DENIES Defendant's Cross-Motion for Summary Judgment as to Defendant's First Counterclaim for Relief; and

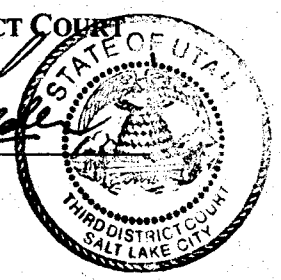
3. Pursuant to this Court's previous ruling bifurcating the issues in this case, the amount and reasonableness of any expenses, including attorney's fees, and the allocation of reasonable expenses with respect to the claims as to which Ms. Strohm has been successful, shall be determined at a later date, following submission of affidavits and such other proceedings as may be required for a full and fair adjudication of the remaining issues.

4. The foregoing Order is entered after full consideration of ClearOne's objection to Ms. Strohm's proposed Order and the exchange or arguments related thereto. This Order reflects the Court's rulings as to the objection and responses.

DATED this 18th day of November 2009.

THIRD JUDICIAL DISTRICT COURT

Hon. Robert K. Hilder



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 080917500 by the method and on the date specified.

MAIL: JAMES E MAGLEBY 170 S MAIN ST STE 350 SALT LAKE CITY, UT 84101

MAIL: MILO STEVEN MARSDEN 136 S MAIN ST STE 1000 SALT LAKE CITY UT 84101

MAIL: BRIAN COUSIN 620 EIGHTH AVENUE NEW YORK NY 10018

Date: 19th November 2009

Deputy Court Clerk

Addendum 9

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SUSIE STROHM and DORSEY & WHITNEY, LLP,	:	**RULING AND ORDER**
	:	**CASE NO. 080917500**
Plaintiffs,	:	
vs.	:	
CLEARONE COMMUNICATIONS, INC.,	:	
Defendant.	:	**Judge Robert K. Hilder**

Plaintiffs' Renewed Motion for Partial Summary Judgment on their Third Claim for Relief (Engagement Agreements), and defendant's cross Motion for Summary Judgment, were argued to the Court on January 6, 2010. Final supplemental briefing on the applicability of Jones, Waldo, Holbrook & McDonough v. Dawson, 923 P.2d 1366 (Utah 1996), was filed on January 15, 2010. The Court has considered all memoranda and exhibits, oral argument, and the supplemental filing regarding the Dawson, issue, and now rules as follows:

The Court has previously ruled in plaintiffs' favor on the statutory right to indemnification. There are essentially two issues now before the Court: (1) can the Court decide, as a matter of law, whether or not plaintiffs have a right to payment or reimbursement for attorney's fees incurred by Ms. Strohm in defense of the criminal action in federal court, and (2) whether plaintiffs have a right to payment of fees incurred related to enforcement of payment or reimbursement rights under

either or both engagement letters. The first engagement letter, dated January 29, 2003, was between counsel Milo Marsden and his prior firm, Bendinger, Crockett, Peterson & Casey, Susie Strohm, and ClearOne Communications. The second letter, dated March 31, 2004, was between Mr. Marsden and his new firm, Dorsey & Whitney, Susie Strohm, and ClearOne Communications.

The Court had previously declined to grant summary judgment based on the engagement letters, because of facial ambiguity concerning the scope and purpose of the agreements. (*See*, Transcript of hearing dated July 1, 2009.) Because of its concern, the Court ordered that discovery should take place regarding the intentions of the parties to the engagement letters, before the Court could either consider the matter on renewed Motion, or the parties could be prepared to bring the matter to trial.

After some skirmishing regarding discovery, defendant ultimately produced Michael Keough, ClearOne's Chief Executive Officer at the time both engagement agreements were signed. Mr. Keough is not presently employed by ClearOne, but defendant indicated that he is, in fact, the only person with knowledge regarding the engagement letters.

ClearOne argues with vigor that the Court should not consider the testimony of Mr. Keough for a number of reasons, including claims that the testimony was elicited through improperly leading and hypothetical questions, some of which were outside the scope of the 30(b)(6)

designation, and also that Mr. Keough revealed bias against ClearOne because he had been involuntarily relieved of his position as CEO in June, 2004. ClearOne also asserts that Mr. Keough's testimony on the scope of the Dorsey engagement letter was contradictory, in that on the one hand he testified that the engagement letters were not intended to give anything more to Ms. Strohm than what she was granted through the ETA, while on the other hand he consistently supported plaintiffs' more expansive view of ClearOne's obligation under the engagement letters.

The Court first considers the complaint about leading questions. Plaintiffs and ClearOne are adverse parties. Although ClearOne apparently has some concern whether Mr. Keough has some bias against ClearOne because of his involuntary termination, he is the only witness they have identified on the critical engagement agreement issues, and he is certainly not plaintiffs' witness on these issues. Accordingly, leading questions are permissible, and usual.

It is true that Mr. Keough's testimony could be seen as both representative of ClearOne on the 30(b)(6) issues, and as his own testimony on factual issues of which he has knowledge, but such an intermixture of testimony is not disqualifying where, as here, Mr. Keough is both a designated witness of defendant, and a former officer with actual knowledge of relevant events. It is a valid argument that ClearOne need not be bound by fact testimony on topics for which he was not produced, but the Court does not conclude that, in this deposition, Mr.

Keough testified factually and in his own behalf in a way contrary to his testimony as ClearOne's voice. With respect to the 30(b)(6) designation, the scope was set forth in the notice, and its language was sufficiently broad to encompass the issues critical to this Court's inquiry regarding the parties' intentions. The notice referenced "circumstances surrounding" and "communications" regarding the engagement agreements.

In short, the Court concludes that while Mr. Keough's testimony may not be pleasing to ClearOne, it neither outside the scope of the deposition notice nor tainted by bias such that it may not stand as the contemporaneous evidence of ClearOne's intentions when the engagement letters were negotiated and executed. Mr. Keough does paint himself as something of a rubber stamp for decisions made by others, but those others, who have not been designated, are also representatives of ClearOne whose actions bind the defendant.

The Court also acknowledges ClearOne's argument that because Mr. Marsden, an attorney, was the drafter of the engagement letters, they should be construed against plaintiffs. While it is true that an attorney/draftsman must assume responsibility for ambiguities that cannot be resolved, the Court determines (as it has previously indicated) that the issue regarding construction against the drafter does not come into play unless and until the Court finds that it is impossible to determine the intention of the parties from the document and the available testimony. In this case, the Court determines that there is no need to

resort to the construction against draftsman rule, because the intentions can be fairly gleaned from the documents and the additional evidence now before the Court.

For the reasons stated, the Court notes that all of the evidence available regarding the drafting and negotiation of the two engagement letters is before the Court, and the Court finds that this evidence is sufficient for the Court to determine, as a matter of law, the intentions of the parties with respect to the letter agreements.

The first issue the Court addresses is the scope of the Bendinger, Crockett letter of January 29, 2003. The first paragraph of that letter states that the parties agree that Bendinger, Crockett will "represent Susie Strohm's interest in connection with the SEC civil Complaint, referenced above, and in connection with further related investigations and litigation." As of the date of execution of the agreement, there was no formal criminal action underway, but the evidence clearly shows that the day before the agreement was signed ClearOne was informed by a Utah Assistant United States Attorney that the office had commenced a criminal investigation targeting ClearOne, Frances Flood and Susie Strohm, stemming from the SEC civil action identified in the letter. Furthermore, on January 31, 2003, just two days after the agreement was signed, Bendinger, Crockett's billing to ClearOne included tasks related to criminal liability and the Joint Defense Agreement that was entered into by the parties on February 7, 2003, and which Agreement was drafted

by ClearOne's counsel, Clyde, Snow, Sessions and Swenson.

The Joint Defense Agreement recitals refer to the criminal investigation and the fact that ClearOne was notified directly by the United States Department of Justice that an investigation was underway, in connection with the SEC action. The Joint defense Agreement further recites that because of the existence of both the SEC action and the Department of Justice criminal action, as well as certain investor suits, the criminal attorneys anticipate further investigation and a need for cooperation. The recitals indicate that the existence of the civil and criminal actions relate to or involve common issues and concerns of their respective clients and that such clients have a mutuality of interest in defending the proceedings.

All of the foregoing recitals, which are essentially contemporaneous with the execution of the first engagement letter, are consistent with the testimony of Mr. Keough that he understood in 2002 and early 2003, as CEO of ClearOne, that a Department of Justice investigation was underway and that criminal litigation could result. This was knowledge he possessed when he signed the first engagement letter, and the Court finds that there is no reasonable dispute that the "in connection" language in the first letter includes within its ambit the criminal action that has become the focus of the present attorney's fee claim.

The Court also recognizes that plaintiffs have identified substantial extrinsic evidence supporting the other evidence, such as

documents and Mr. Keough's testimony, to support the conclusion that ClearOne intended to provide Ms. Strohm a full defense, civil and criminal, and they intended to retain Mr. Marsden and his firm(s) for that purpose. ClearOne has also identified extrinsic evidence, for the contrary purpose, especially to argue that because Mr. Marsden was not a recognized criminal lawyer, or was not principally so employed when the letters were executed, ClearOne could not be deemed to have been extending financial support for the criminal action. The Court finds that plaintiffs' proffered evidence does indeed support the conclusion that ClearOne understand the nature of the representation, even if it is likely that it did not recognize the degree of liability it may incur. On the other hand, nothing in the evidence supports the view that Mr. Marsden was so unidentified with criminal practice that his retention requires a conclusion that the two letters did not contemplate criminal defense.

In fact, in the Salt Lake legal market, some of the best practitioners may wear two or more hats. Indeed, Max Wheeler, who has been cited in this case as the quintessential white collar criminal lawyer, is also well known as a skilled litigator in complex commercial matters, among others. There is noting anomalous about the roles assumed in this case by Mr. Marsden or his colleagues.

The next point is that even if there was doubt regarding the probability of criminal actions at the precise date of signing the first

letter, such doubt would not be reasonable by the time the second letter agreement was signed on March 31, 2004. For example, both the November 20, 2003, draft Employment Termination Agreement ("ETA") and the December 5, 2003, final version explicitly referenced "a grand jury investigation being conducted by United States Department of Justice." The later date was still almost four months before ClearOne executed the Dorsey engagement letter.

Mr. Keough confirmed that he was aware of the ongoing grand jury investigation at the time he signed the ETA. The only testimony that would suggest ClearOne did not have knowledge of, or appreciate the significance of the Department of Justice investigation at the time the ETA was signed, or at the time the Dorsey & Whitney engagement letter was signed on March 31, 2004, was the testimony of prior counsel Jefferson Gross, who indicated that he thought the Department of Justice investigation had "died," but the evidence and the overall context make it clear that Mr. Gross did not know that the investigation had been terminated in any way, but was merely hopeful that lack of activity was a positive sign. In addition, the testimony referred to ClearOne's knowledge in about fall 2003. Whatever that knowledge in fact was, the draft and final ETA later in 2003 unequivocally identified the criminal proceeding.

Addressing the relationship of the two letters, some discussion has occurred, prompted in part by the Court's questions, whether the two

letters are separate agreements, or whether together they comprise one agreement. Following briefing and argument, and review of the testimony, the Court determines that they can only be read together, to form one agreement, the latter updating and supplementing the former. The single biggest impetus for the second letter was Mr. Marsden's change of employment. That change necessitated a modification to establish a contractual relationship with Dorsey & Whitney.

The Dorsey & Whitney letter implicitly incorporated the terms of the Bendinger, Crockett letter, changing only those elements of the former agreement that were specifically addressed. The Court determines that new language that changed substantive rights and obligations may not be applied retroactively; e.g. the Dorsey letter inclusion of interest at 18% may not be invoked before March 31, 2004, but the Court considers in unlikely that any such claim will be made. On the other hand, the contractual claim for attorney's fees incurred in enforcing the agreements was first included in the Bendinger, Crockett letter, and shall apply to both agreements.

The next issue the Court considers, returning to the Bendinger, Crockett letter initially, is the issue of reasonableness of fees and extent of potential liability on the part of defendant. The underlying events and criminal case have consumed many years, with the attendant significant increase in attorney fee rates. In addition, Mr. Marsden moved from Bendinger, Crockett to Dorsey & Whitney in 2004. Bendinger,

Crockett was a very well respected Salt Lake firm that has since merged with a national firm, Howery, but in 2004 it was a local boutique litigation firm.

Dorsey & Whitney, as a large national firm, generally charged higher billing rates than were customary at Bendinger, Crockett, and the Court would suggest customary in this community at that time. In the Bendinger, Crockett engagement letter, Mr. Marsden recites his rate at $255 per hour, however, he also agrees to discount his rate by 10% under the agreement. The letter further recites that the rates are reviewed and adjusted annually. The letter indicates that billings shall be based on normal hourly rates for all employees of the firm who work on the matter, but the Court determines that the reasonable intention of the parties to be drawn from the Bendinger, Crockett letter is that Milo Steven Marsden was the lead attorney, and that except in unusual circumstances, his rate would be the highest rate.

Fee discussion in the Dorsey letter restates Mr. Marsden's rate of $255 per hour, subject to adjustment, without reference to a discount. The letter contains no specific recitation of fees for other Dorsey lawyers or para-professionals. The Bendinger, Crockett letter provides that "ClearOne will pay the full amount of our bill within thirty days after receipt." The Court cites these provisions for the sole purpose of putting the parties on notice that a reasonable fee determination is within the sound discretion of the trial court, but the Court will be

guided as much as possible by contract language, with the caveat that, as discussed during argument, the payment "in full" language will not be a factor determining a reasonable fee. The Court determines that the provision for interest at 18%; however, is a contractual provision, that is carried forward to the second letter agreement, and it is enforceable unless determined to be unconscionable as a matter of law. Knight Adjustment Bureau v. Lewis, 2010 UT App 40 (Feb. 19, 2010).

The final issue is whether Dorsey (the Court assumes that the argument does not apply to Ms. Strohm, who is a party to this action, but not appearing *pro se*) is precluded from recovering fees expended by its lawyers to enforce the rights addressed herein under the rule laid down in Jones, Waldo, Holbrook & McDonough v. Dawson, 923 P.2d 1366 (Utah 1996). I have re-read the case, the memoranda and additional cases cited in the memoranda. Plaintiffs suggest that (1) the rule stated does not apply to the facts of this case, or (2) Dawson was wrongly decided by our Supreme Court. Counsel will understand that if this Court can decide the issue on the first rationale, it will do so.

In fact, after considering the rule, the applicable cases, and particularly the background of the Dawson case, which drew considerable attention when issued, I must agree with plaintiffs that the facts are not close. Primarily, Dorsey may represent itself, but it also represents Ms. Strohm, and everything that underlies this present action stems from the lawyers representation of Ms. Strohm in a major criminal action.

Next, Dorsey is not suing its client. The claim for fees incurred in enforcing the payment or reimbursement rights arises from a contract between Dorsey and Ms. Strohm and ClearOne. ClearOne is not a client, but simply a third-party payer. The rights of Ms. Strohm under the applicable agreement cannot be vindicated unless she has competent counsel to assert those rights. This circumstance bears no resemblance to a case where a law firm represents a client, charges a fee apparently well in excess of an agreed cap, and more than the benefit received by the client, after which the firm uses its power and expertise to enforce collection. The Court concludes that Dawson does not preclude a fee award for the contract enforcement action, but the same reasonableness analysis that the Court will apply to the fees incurred in the criminal case will be applied to any fee award for enforcement.

Based on the foregoing, the Court determines that plaintiffs' Renewed Motion for Partial Summary Judgment as to its Third Claim for relief (engagement agreement letters) be and hereby is GRANTED, as follows: The Court finds that the two letters of January 29, 2003 and March 31, 2004, together form an enforceable contract, providing an alternative basis to require defendant ClearOne Communications to pay Susie Strohm's reasonable legal fees incurred in her defense of federal criminal proceedings as previously identified in this action or to reimburse her for fees paid to her counsel and co-plaintiff. The Court reserves the issue of whether Ms. Strohm's fees should be allocated to

account for the single Count on which she was convicted at trial. Plaintiffs are also entitled to judgment for interest and fees incurred in seeking recovery under the letter agreements. ClearOne's Motion for Summary Judgment is hereby DENIED.

Dated this 2nd day of March, 2010.

By the Court:

Robert K. Hilder, District Court Judge

STATE OF UTAH THIRD DISTRICT COURT SALT LAKE COUNTY

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Ruling and Order, to the following, this 2nd day of March, 2010:

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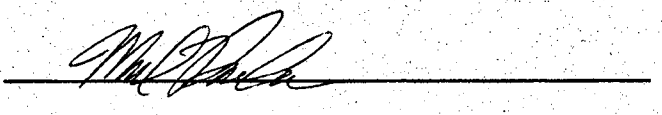


Addendum 10

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SUSIE STROHM and DORSEY & WHITNEY, LLP,	:	RULING AND ORDER
Plaintiff,	:	CASE NO. 080917500
vs.	:	
CLEARONE COMMUNICATIONS, INC.,	:	Judge Robert K. Hilder
Defendant.		

On September 20 and 23, 2010, the Court heard argument on plaintiffs' Petition for an Award of Reasonable Attorney's Fees and Costs, and defendant's Cross Motion for Summary Judgment and Opposition to Fees. Plaintiffs were represented by Milo Steven Marsden, Cameron Hancock and William Michael. Defendant was represented by Brian Cousin and Neil Capobianco. Following argument, the Court took the matter under advisement. Thereafter, on October 14, 2010, defendant's counsel submitted a letter and a Supplemental Declaration of Narasimhan Narayanan, dated October 13, 2010, which provided evidence of the hourly rates paid by ClearOne for all of its Salt Lake City-based attorneys and para-professionals since 2007. Defendant's counsel also took the opportunity to respond to cases cited by the Court at the September 23, 2010, hearing.

On October 15, 2010, counsel for plaintiff objected to the letter and the supplemental rates submission. Because the Court did in fact

reference several cases that were not included in either side's briefing, the Court has considered the letter response addressing each case. With respect to the Supplemental Declaration, while the Court agrees with plaintiff that this submission exceeds the limited permission granted by the Court to supplement the record with some rate information, on review the Court finds that the rate information is such that while it is more grist for the mill, it does not in fact change the Court's analysis or conclusion. The information has been considered and given the weight it should be accorded, in light of the limited context in which it is presented.

DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

The Court addresses herein the various arguments asserted in defendant's Cross Motion for Summary Judgment.

Defendant did not Effectively Terminate Dorsey & Whitney's Representation on November 30, 2009, or Any Other Date

The Court indicated during oral argument that it rejected ClearOne's argument that the letter from ClearOne's counsel, dated November 30, 2009, effectively terminated Dorsey & Whitney's representation of Susie Strohm. The Court will briefly state its reasons herein. While the Dorsey engagement letter of March 31, 2004, does indeed include the language that "we [Dorsey] will withdraw from representation upon your request," ClearOne's reliance upon that language as authority for ClearOne's unilateral termination of Dorsey's representation of Susie Strohm is misplaced. The core problem with the termination attempt is well stated in William Michael's letter of December 3, 2009: "ClearOne does not have, and never has had, authority pursuant to the engagement

letter to terminate Dorsey's services. That authority rests with our client, Mr. Strohm."

While ClearOne is indeed a party to the engagement letter, and the language regarding termination could have been better drafted, it is nevertheless crystal clear from the letter that Dorsey represented Susie Strohm, and ClearOne's role was as third-party payor for those services. Noting prevents ClearOne from contesting the necessity or reasonableness of fees charged, but construing the language as authorizing ClearOne to unilaterally terminate the attorney-client relationship runs directly counter to the very nature of that relationship and further violates Rule 1.16(b), Utah Rules of Professional Conduct. In addition, even if the termination was otherwise effective, Dorsey was probably not ethically permitted to withdraw given the status of the case without leave of Court.

Utah Public Policy Does Not Prevent Enforcement of the Dorsey Engagement Agreement

Discussion of any public policy issue must be undertaken in light of the basis upon which the Court is considering an award of attorney's fees. In two prior Rulings, this Court has determined that (1) Susie Strohm is entitled to mandatory indemnification under Utah Code Ann., § 16-10a-907, and (2) Ms. Strohm is entitled to reimbursement for her legal expenses pursuant to the terms of the explicit engagement agreement (now deemed to be the two engagement letters construed together), which created a binding contract between Ms. Strohm, ClearOne and Ms. Strohm's counsel, ultimately Dorsey & Whitney.

In its Cross Motion for Summary Judgment, ClearOne seeks to

interpose a standard of conduct prerequisite to indemnification and/or reimbursement of Ms. Strohm's reasonable and necessary fees. To do so, ClearOne relies upon Utah Code Ann., § 16-10a-902(1). ClearOne cites this section correctly, but subsection -902 deals only with the indemnification of directors of the corporation. Subsection -907, on the other hand, entitled "Indemnification of officers, employees, fiduciaries, and agents," applies to Ms. Strohm, and that section does not include the explicit standard of conduct language. It is true that subsection -907(3) states that the corporation may indemnify an officer who is not a director "to a greater extent, if not inconsistent with public policy," (emphasis added). But this general language does not establish a standard of conduct threshold for officers that is not otherwise expressly stated. This reading is consistent with the Official Commentary, at 908, which states:

> Section 907(3) authorizes indemnification for officers, employees...who are not directors, but neither requires nor prescribes standards for their indemnification and expressly states that their indemnification may be broader than the right of indemnification granted to directors.... In effect, this leaves public policy determinations as to what are permissible limits, in a particular case, to the courts.

This Court determines that there is, in fact, no absolute public policy bar to ClearOne's indemnification or reimbursement of Susie Strohm's fees. The Court recognized that in its Order of November 18, 2009, determining that Ms. Strohm was entitled to mandatory indemnification under Utah Code Ann., § 16-10a-903 and -907, but that recovery is limited to "the proceeding or claim(s) with respect to which [s]he has been successful." In that Ruling, the Court noted that Ms.

Strohm had successfully defended herself against seven of the eight counts, or claims, alleged against her in the criminal proceeding.

This Court does not reject out of hand the possibility that a partial conviction might in some cases defeat or substantially reduce a fee award. For example, Ms. Strohm was charged with seven counts of securities fraud. These were very serious counts, and they suggested conduct not in any way consistent with the best interest of the corporation. Had Ms. Strohm been convicted of one or more counts of securities fraud, ClearOne's argument that public policy should bar indemnification or reimbursement of fees and expenses would have considerable force. The one perjury conviction, standing apart from the securities fraud allegations, and coming later in time, does not carry the same force or public policy concern. While the Court reiterates that Ms. Strohm should not receive fees related to the single count upon which she was convicted, this Court is persuaded that based on the overall success of her defense, and her complete vindication of any securities fraud charges, it would be inconsistent with both the indemnification statutes for officers, and the engagement agreements, to allow ClearOne to avoid both a statutory responsibility and a contractual obligation it voluntarily incurred.

ClearOne Does Not Have Any Present Obligation to Pay Fees And/Or Costs Incurred by Dorsey in Behalf of Ms. Strohm Following her Conviction on the Single Perjury Count

Ms. Strohm has no present obligation to reimburse ClearOne for fees and costs related to the perjury count before conviction (see following section), even if the proportion attributable to that count

can be established. On the other hand, now that there has been a conviction on the one count, from the date of that jury verdict ClearOne shall not be held liable, at this time, to pay Ms. Strohm's fees and expenses in the criminal case post-February 27, 2009, all of which must be attributed to the perjury count. However, in the event Ms. Strohm is ultimately exonerated on that sole count, her claim will then arise for reimbursement for all reasonable and necessary fees and expenses.

Indeed, ClearOne's counsel conceded as much in oral argument on September 23, 2010:

> COURT: If she [is] ultimately vindicated on appeal, do you then say, okay, we're going to step up and pay?
>
> MR.COUSIN: Well, Your Honor, to me that's where the statutory obligation comes in and you've already ruled on that. So to me, if she goes up on appeal, and she wins a reversal on the perjury charge, then why isn't she eligible under statutory indemnification?

Transcript at 17.

It does not follow from this decision that ClearOne is entitled to a reduction of fees incurred in the civil collection case after the conviction. Plaintiffs are the prevailing party in the collection case. They need not prevail on every claim, or to the full extent of any claim, to be entitled to fees. Claims for which there is no legal entitlement to fees, and which do not share common facts, may trigger an obligation to allocate compensable versus non-compensable claims, but as stated in following sections, the Court does not find these exceptions are present.

The Court's Reasonableness Determination is Limited to Fees and Expenses Billed But Not Paid After March 31, 2008

ClearOne has argued that the Court's application of a reasonableness determination should apply to all fees and expenses incurred and billed, including those bills incurred through March 31, 2008 that were paid in substantial part. ClearOne has provided a helpful summary of all Dorsey invoices related to Susie Strohm's criminal defense through July 14, 2010. The summary includes payments made on billings for work done through March 31, 2008. It is undisputed that no payments have been made for work completed by Dorsey & Whitney after that date. It is also undisputed that of the eleven bills submitted for what appears to be approximately a ten month period, ClearOne paid four of those bills without any contest, and they paid an ultimately agreed amount, which in some instances reflected a bill reduction, on the remaining seven invoices. In other words, ClearOne did not accept the bills without scrutiny, but after going through a process of challenging certain payments, ClearOne paid either an adjusted amount or the original charges, and the Court does not consider those billings to be at issue for purposes of this Ruling.

The Court notes that the total deduction based on ClearOne's objection to certain fees and costs through March 31, 2008, was $44,009.30 (the Court calculates the total amount billed as $1,341,081.30, and ClearOne ultimately paid $1,297,072.00). The deduction amounts to 3.28%. The Court further notes that at page 8 of ClearOne's Memorandum in Support of Cross Motion for Summary Judgment,

ClearOne states that it has expended approximately $3.196 million in fees and expenses on Ms. Strohm's behalf. While the Court has no reason to doubt that the figures set forth in the calculation are accurate, the total includes all payments made by ClearOne in behalf of both Ms. Strohm and Francis Flood, her co-defendant and a director of the corporation, through August 18, 2009. A portion of the total is about $224,000 paid to Bendinger, Crockett, Mr. Marsden's prior firm, and it appears that there may be some payments listed therein to Dorsey & Whitney before the date of commencement of the ClearOne summary in its Memorandum.

The Court does not agree with ClearOne that all amounts paid in behalf of Ms. Strohm and her co-defendant, whether attorney's fees or costs, are necessarily payments for Ms. Strohm's benefit, although in light of the Joint Defense Agreement, some of the payments undoubtedly benefitted both defendants. The numbers the Court has used through March 31, 2008 apparently do not include all payments made to Dorsey & Whitney, and perhaps none paid to Bendinger, Crockett, but the Court also notes that the indemnification and/or reimbursement obligations related to matters other than the criminal prosecution, including the SEC action. Based on everything presented by counsel for all parties, the Court is confident that its focus for the most part on billings commencing April 1, 2008, and the amounts provided by counsel and et forth in the record, is the appropriate determination in this action for fees and expenses related to the criminal prosecution only.

The Court's determination to limit scrutiny to post March 31,

2008 is further buttressed by the application of the voluntary payment rule, addressed in the following section.

Voluntary Payment Rule

While the Court believes that the reasons already stated justify its decision to not revisit the reasonableness of fees and costs already paid by ClearOne, with the exception of a portion that may be attributed to defense of the Perjury count, another basis exists in support of that determination. That is, counsel for ClearOne indicated on more than one occasion that there was in fact no legal basis to compel ClearOne to pay the fees and costs that it has expended; therefore, asserted ClearOne, plaintiff were fortunate that ClearOne had made such payments voluntarily. The Utah Court of Appeals has adopted the voluntary payment rule, albeit without much explanation: "A person cannot recover back money which he has voluntarily paid with full knowledge of all of the facts, without fraud, duress, or extortion in some form." Southern Title Guar. Co. v. Bethers, 761 P.2d 951, 955 (Utah App. 1988)(quoting 66 Am. Jur. 2d Restitution).

This Court has previously determined that an appropriate application of the voluntary payment rule requires at least some inquiry whether the party making the payment had an intention to waive his or her rights to recover. While the rule itself does not contain such a requirement, courts have held that if in fact a payment was made under protest, application of the rule would be against the weight of authority. Avianca, Inc. v. Corriea, 1992 U.S. Dist. LEXIS

4709 (D.D.C. 1992).

While the Court is not expressly relying upon the voluntary payment rule in this case, the only evidence of protest by ClearOne is its objection to some of the invoices, but the ultimate payment of a compromised amount suggests that at that time any protest was withdrawn. When ClearOne ultimately could not accept the charges, it stopped paying fees altogether, and amounts billed thereafter are the principal subject of this Ruling. For the reasons stated herein, the Court will not go back and determine the reasonableness of fees billed through March 31, 2008.

ClearOne is Not Entitled at This Time to Reimbursement of Fees Previously Paid With Respect to Defense of the Perjury Charge

Fees and expenses already paid for defense of the perjury count may be an exception to the foregoing determination, but ClearOne is not entitled to a reimbursement of such fees and expenses incurred and paid with respect to the single perjury count at this time. This is so for a several reasons. First, the undertakings upon which ClearOne relies are part of the Employment Termination Agreement ("ETA"). The fees being sought through this action are not expressly conditioned upon that Agreement. Nevertheless, the Court and parties have referenced the ETA to aid determination of the intentions of the parties to the engagement letter agreements, and the Court will do so herein.

Second, ClearOne agreed to advance fees, and Susie Strohm agreed to reimburse fees advanced if it was "ultimately adjudged that [she]

did not meet the requisite standard of conduct." (Emphasis added) In seeking to enforce this provision, ClearOne does not address the fact that it ceased making advancements, and ultimately ceased reimbursing the fees. As a general rule, a party seeking to enforce a contract must show that it has fulfilled all of its own obligations under the contract.

Third, fees incurred related to the perjury conviction could be an exception to this portion of the ruling, if the agreements taken together (including the ETA) clearly expressed the parties' agreement that upon trial court conviction of a charge, the reimbursement provision of the ETA undertakings was triggered. The Court can reach no such conclusion. Apart from the statutory statement that conviction alone "is not, of itself, determinative that the [officer] did not meet the standard of conduct described" in U.C.A. § 16-10a-902, the ETA language also raises doubt. That is, the obligation to reimburse is triggered when the officer is "ultimately adjudged that [she] did not meet the requisite standard of conduct.

Briefly applying the language to the facts: (1) The only express standard of conduct requirement is contained in the ETA. (2) The Court has determined that public policy does not import a standard of conduct requirement into the agreements or the statute that would bar either statutory of contractual indemnification for an officer. (3) The standard in the ETA requires "ultimate" adjudication. (4) A good faith argument can be made that the jury conviction on February 27, 2009, is not the ultimate adjudication of guilt, let alone of breach

of the standard of conduct, which may be a discrete determination. This is so because the conviction was vigorously challenged in both post-trial motions, and now on appeal, and even an ultimate conviction is not solely determinative. Accordingly, ClearOne's claim for reimbursement for fees paid and attributable to the perjury count is denied, but without prejudice to renewal following ultimate adjudication.

The Agreement Interest Rate of 18% is Not Unconscionable

The Court has previously determined that the interest rate on past-due attorney's fees and costs set forth in the original Bendinger, Crockett engagement letter remained in force upon execution of the Dorsey & Whitney engagement letter, dated March 31, 2004. ClearOne now challenges that interest rate as unconscionable under Utah law. ClearOne raises challenges under both procedural and substantive unconscionability standards. The Court rejects both. The procedural argument appears to rely heavily on ClearOne's position that its then recently appointed CEO, Michael Keough, "was without bargaining power, was not a member of the Board of Directors, and believed that he was not free to negotiate the terms of the retaining of Mr. Marsden." Mr. Keough did testify in his deposition that to some degree he was a rubberstamp, but ClearOne ignores the reality that if Mr. Keough did in fact lack power, it was not because of any actions by Dorsey & Whitney or Susie Strohm. In fact, any limitations on Mr. Keough's power to negotiate regarding the interest rate, or any other terms of the Agreement, assuming they existed at all, derive

from limitations placed upon him by the ClearOne Board of Directors. It is a novel argument for a corporate entity to claim that it was disadvantaged in negotiation because its governing board either appointed an inexperienced CEO as negotiator, or deliberately limited the CEO's authority. The Court rejects this argument.

With respect to substantive unconscionability, 18% interest is an extremely common interest rate in collection matters in the state of Utah. Utah does not have a usury law, and much higher rates are charged and enforced on a daily basis. The Court understands that Utah's "legal rate" for prejudgment interest of 10% is substantially lower than 18%, but that rate is simply a default rate in the event the parties fail to contract for a rate. In this case, two ostensibly sophisticated parties negotiated an interest rate that is standard in collection contracts, including for attorney's fees, within this community. There is no basis for the Court to reject the agreement the parties made for themselves.

PLAINTIFFS' PETITION FOR FEES AND COSTS

Plaintiffs Are the Prevailing Parties in This Civil Action for Enforcement of the Right to Fees and Costs, and as Such They Are Entitled to Reasonable Fees and Costs Incurred in This Action

Based on the Court's other decisions in this case, there is no question that plaintiff Dorsey & Whitney and Susie Strohm are the prevailing parties in this action. While the concept of prevailing party has some flexibility, under any measure plaintiffs have prevailed in this case, thus triggering the right to fees and costs incurred in this action as set forth in the engagement agreements.

In Utah, an award of attorney fees to a prevailing party must be authorized by statute or contract. See e.g. Doctors' Co. v. Drezga, 2009 UT 60, ¶ 32, and Fericks v. Lucy Ann Soffe Trust, 2004 UT 85, ¶ 23 (citing Foote v. Clark, 962 P.2d 52, 54 (Utah 1998)). Both are in play here, and the underlying legal right to fees and costs has been decided in plaintiffs' favor. Generally, though, "the fact that a party may ultimately 'prevail' in litigation does not necessarily entitle that party to recover all of its attorney's fees incurred from the outset of the litigation." Flying J Inc. v. Comdata Network, Inc., 2007 U.S. Dist. LEXIS 84554, *39 n.16 (D. Utah Nov. 15, 2007), aff'd by 322 Fed. App'x 610, 617 (10th Cir. 2009) (unpublished). Brookside Mobile Home Park v. Sporl, 2000 UT App 195 (Mem. Decision) (citing Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988), Rappleye v. Rappleye, 855 P.2d 260, 266 (UT App 1993) and Martindale v. Adams, 777 P.2d 514, 517-18 (Utah App 1989)). In short, while contractual fees are usually mandatory, the Court may exercise discretion in the amount awarded.

To determine a reasonable award of attorney fees and costs the Court does not measure reasonableness by what the prevailing attorney actually bills in the case. See Cabrera v. Cottrell, 694 P.2d 622, 624 (Utah 1985). Rather, the Court considers the following factors:

1. What legal work was actually performed?
2. How much of the work performed was reasonably necessary to adequately prosecute the matter?
3. Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services?

4. Are there circumstances which require consideration of additional factors, including those listed in the Code of Professional Responsibility?

Dixie State Bank, 764 P.2d at 990 (citations omitted).

Application of the Reasonableness Factors

Work performed and its necessity (factors 1 and 2). The billings are voluminous, in both cases. Except for broad attacks, such as ClearOne's suggestion, addressed below, that only forty percent of the work done by plaintiffs in the collection case addressed compensable claims, there is little detailed critique of the work done. The Court finds no rational basis to secondguess line after line of charges billed by seasoned counsel, who were engaged in the criminal case in defending complex and very serious charges that imperilled the client's liberty and reputation, especially in light of the overall excellent result. The collection case was less complex in this Court's view, but it was aggressively defended throughout, with no quarter given, and numerous motions and arguments urged, then urged again, by counsel who in fact billed sums approaching those billed by plaintiffs. And for the most part, plaintiffs prevailed.

In the criminal case, ClearOne insists that to the extent Susie Strohm incurred a greater defense bill with Dorsey than Francis Flood incurred with Snow, Christensen & Martineau, Ms. Strohm's fees are likely excessive, both in work done and rates charged. Rates are addressed below, but the challenge to the work done is too simplistic, and it also ignores or unreasonably discounts the division of labor

between the firms. The evidence before the Court is unrebutted that Dorsey & Whitney, with its greater resources and experience in this area took the laboring oar in document review and management, preparation of witness kits and trial exhibits, and similar work, the fruits of which were shared with Snow, Christensen & Martineau under the Joint Defense Agreement. As expensive as this defense has been to the parties, the Court's only reasonable conclusion is that but for the Joint Defense Agreement and the division of labor that occurred, the cost may well have been considerably higher.

ClearOne also complains about continuances in the criminal case. Continuances do in fact increase the cost of a lawsuit, but they are a sadly unfortunate feature in both civil and criminal cases. There certainly are times when the request for a continuance unnecessarily increases expense, but in this case one of the continuances resulted at least in part from ClearOne's termination of payment of fees and expenses necessary for trial preparation.

Billing rates. The standard is that the attorney's billing rate must be consistent with the rates customarily charged in the locality for similar services. ClearOne attacks Dorsey's rates with vigor, and while the Court agrees that some rate reductions are in order, Dorsey's rates are not seriously out of step with rates that prevail in the Salt Lake legal community, particularly when the Court examines rates from the most critical years; namely, 2008 to the present.

A simple comparison of either work done by Dorsey & Whitney and Snow, Christensen & Martineau, or their respective hourly rates is

generally unhelpful to the court in either the criminal or the collection case. ClearOne challenges the reasonableness of the fees incurred in the defense of Ms. Strohm on a number of bases. One is the reasonableness of the hourly rates charged by the Dorsey & Whitney attorneys, and as primary evidence in support of this challenge, ClearOne emphasizes the hourly rates of the Snow, Christensen & Martineau attorneys who represented Ms. Flood. The Court certainly considers the rates charged at Snow, Christensen & Martineau in this case as an important item of evidence of a reasonable rate, but it is only one piece of evidence. The Court analyzes hourly rates at this point.

First, Dorsey identifies nine timekeepers (eight lawyers and one paralegal) who together account for 92% of Dorsey's billed time in both cases. The Court specifically addresses the rates of these timekeepers, and extrapolates a comparable reduction for the remaining eight percent of billed time. The rates cover up to three relevant time periods: Two rate periods, April 1, 2008 to October [1] 2008 (rate # 1), and October 2008 to present (rate # 2), effectively address all timekeepers, except Mr. Michael, who increased his rate on October 2009, to present (rate # 3). The Dorsey personnel are addressed herein from highest billable rate, to the lowest, with city of residence shown:

WILLIAM MICHAEL, JR.	Rate # 1	$515	Minneapolis
Bar 1985	Rate # 2	$575	
	Rate # 3	$615	
CHRISTOPHER SHAHEEN	Rate # 1	$475	Minneapolis
Bar 1987	Rate # 2	$525	

M. STEVEN MARSDEN	Rate # 1	$360	Salt Lake
Bar 1986	Rate # 2	$375	
CAMERON HANCOCK	Rate # 2	$340	Salt Lake
Bar 1988			
SURYA SAXENA	Rate # 1	$270	Minneapolis
Bar 2004	Rate # 2	$310	
SCOTT CUMMINGS	Rate # 2	$280	Salt Lake
Bar 2005			
JENNIFER GARNER	Rate # 1	$255	Salt Lake
Bar 1989	Rate # 2	$285	
CRAIG KLEINMAN	Rate # 1	$245	Salt Lake
Bar 1999	Rate # 2	$265	
SONYA RUSSELL	Rate # 1	$115	Salt Lake
Paralegal 1993	Rate # 2	$120	

Addressing these timekeepers in the order listed, Mr. Michael was lead criminal counsel, and he also had a substantial role in the collection case. His rate # 1 of $515 per hour (effective 2007) has been proposed by plaintiffs as a possible compromise for the entire criminal and collection calculation, but ClearOne has argued for substantially lower rates. The argument that the highest rate for Snow, Christensen lawyers should cap all Dorsey rates is not persuasive. As the Court stated during argument, the Snow, Christensen rates are arguably too low, particularly those of Mr. Wheeler and Mr. Van Wagoner. Even if the Snow, Christensen rates were a determinative measure in some respects, this Court is persuaded that Mr. Michael's skill, experience-and results in this case-persuasively place him in the upper echelon of criminal lawyers handling complex securities

matters.

Fair comparisons to Mr. Michael, in the Salt Lake legal community, include James Jardine (Ray, Quinney & Nebeker) and David Jordan (Stoel, Rives). Record evidence at comparable times include billing rates for both of $450 in 2008-2009. Ray, Quinney rates increased about 5% in 2009, but at that time Mr. Jardine had started a three year leave. In the same time frame, an unnamed Ray, Quinney shareholder billed as high as $650. Plaintiffs' expert David Greenwood provided an affidavit in support of Dorsey rates. He validated both the selection of highly skilled specialist, and the reasonableness of Dorsey rates in both cases. In his first affidavit, Mr. Greenwood disclosed that his rate was higher than the $515 charged by Mr. Michael in 2007.

Mr. Marsden's rates exceed the $255 per hour quoted in the 2003 and 2004 letter agreements, and the first letter promised a ten percent discount, which was provided in early billings, apparently related to the SEC case. ClearOne attempts to use the quoted rate as a cap for Dorsey rates, but that effort fails. First, both letters make it clear that Mr. Marsden's rates (his and his respective firm's) were adjusted yearly, or subject to change. Second, while plaintiffs argue, and the Court has agreed, that the specter of criminal proceedings was known to ClearOne from the beginning, the ultimate form and complexity was not known. It was a matter of professional responsibility for Dorsey to staff the case as it evolved, with the lawyers best able to represent Ms. Strohm. There can be little argument that Mr. Michael

was an appropriate choice. Mr. Michael's time shall all be calculated at $515 per hour.

Second, the rates at issue in this proceeding started to accrue in 2008, five years after Mr. Marsden quoted his initial rate. Both the evidence and the Court's substantial knowledge of billing rates in this community support the conclusion that rates increased significantly over this time. That Mr. Marsden's rates remain comparable to his peers, or even a little lower, is shown by record evidence. As the Court stated during argument, one easily identified peer of Mr. Marsden's, in both years of experience and skill, is Mark Bettilyon. In 2008 Mr. Bettilyon's rate was $400 per hour. In 2009 it increased to $420 per hour. Numerous lawyers of similar or less experience than Mr. Marsden, identified in the record, bill in the range of $350 to $380 per hour. In contrast, Mr. Marsden's highest rate in this case is $375. Mr. Marsden's time shall be awarded at his rate # 1, $360 per hour.

Mr. Hancock is also an experienced and very able lawyer. His rate of $340 is consistent with that experience, and shall be applied to all of his time. Mr. Shaheen is a Minneapolis partner, of apparent skill and experience. In Minneapolis his rate is undoubtedly appropriate, but applying the local standard, the Court determines that his rate shall be adjusted to $400 per hour for all time, to more closely resemble his Salt Lake peers.

Ms. Garner's rate is commensurate with her years of experience, but in light of the fact that her role in this case entailed less

responsibility than her senior colleagues, her rate shall be awarded at $250 per hour for all time billed. Mr. Cummings is a relatively junior lawyer, and consistent with his experience level, his rate shall be reduced to $220 per hour.

Craig Kleinman, with more than ten years of experience in Salt Lake, shall be billed at $230 per hour. Surya Saxena, a Minneapolis associate with an experience level just a little more extensive than Mr. Cummings's, shall be billed at $230 per hour.

Addressing Ms. Russell, the Court finds that despite ClearOne's argument to the contrary, all paraprofessional rates for Dorsey employees in both Minneapolis and Salt Lake are well within the Salt Lake reasonable fee range, as attested to by, among other measures, Snow, Christensen's paralegal rates. No adjustment shall apply to para-professionals.

For all other Dorsey lawyers, whose time comprises a relatively low percentage of either billing, the Utah lawyer rates will remain as billed, and the Minneapolis lawyers rates shall be reduced to the rate that best approximates the rates of Utah Dorsey lawyers with similar experience levels, based on bar admission dates, which rates have been determined by the Court in this section.

Consideration of additional factors. A number of other factors should be addressed at this point. Discussion of each follows:

Expenses, Including Travel and Lodging Expenses for Out-of-State Counsel Are Generally Reasonable Under the Circumstances (Both Cases)

ClearOne understandably argues that if Susie Strohm used only

Salt Lake-based attorneys, then there would not be a need for much of the travel and lodging expenses that are included in the Dorsey & Whitney billings. The problem with the argument is that ClearOne agreed to fund all reasonable and necessary expenses, and they did not place any restrictions on the identity or geographic location of counsel, neither should they. The choice of counsel decision is clearly reserved for the client. ClearOne is not the client.

As a sophisticated corporation, represented by counsel, ClearOne is charged with the knowledge that in the present day legal market, much of the most sophisticated work is carried out through regional, national and international law firms. It is expected that however the legal services are delivered, the firm in question will assign the best-suited lawyers and para-professionals, regardless of where they are located. It is also expected that where appropriate, work is done at lower billing rates. While the Court addresses billing rates in this Ruling and Order, it does not see a legitimate basis either on general terms, or under the facts of this case, to secondguess the assignment of specific counsel, regardless of where those counsel are located.

The Court again notes that it is fully persuaded that lead criminal counsel, William Michael, Jr., was eminently qualified for the task, and the results speak for themselves. Short of a specific agreement or express provision that counsel should limit or completely avoid billing the lodging and travel costs, the Court is unwilling to apply such cuts to the billed amounts. The Court does, however, agree

that in the specific context of travel time, careful scrutiny is necessary to insure that the billing is fair.

The Court considers two sides to the inquiry regarding travel time. Travel time that does not include any preparation or related work done in behalf of this client is arguably of less value to the client. On the other hand, travel time that is not available to the lawyer for work for any other client is ultimately a cost to the lawyer, a cost that is imposed only because of his or her engagement on this client's business.

This Court determines that a reasonable accommodation of these concerns is as follows: For all travel time billed and described as travel and preparation, no deduction to the bill should be applied. For travel time billed without any description that includes preparation or work on the case, Dorsey is directed to apply a 25% reduction. The application of this directive shall be applied to the bills containing charges post-March 31, 2008, as they have been presented up to this time. That is, Dorsey is instructed it shall not go back and now identify support that might change the descriptions. At this point in the case, the Court determines that the parties need to live with the existing submissions. There will be no reductions for lodging and related expenses charged in Salt Lake or in any other area where counsel had to travel to discharge their responsibilities to Ms. Strohm.

Travel expenses were a substantial portion of all expense (cost) claims. The Court has seen nothing that persuades it to engage in a

further detailed examination of costs to seek cuts. Accordingly, except for the travel adjustment set forth in this section, all requested expenses in both cases shall be awarded.

Block Billing
(Criminal Case)

ClearOne has also raised some concerns about the adequacy of records provided. The Court notes that initially ClearOne agreed to accept block billings, but regardless the Court has reviewed the billing records produced, and finds that they are adequate under general billing standards, and the Court will apply no reduction based on any purported inadequacy of the billing records.

Reasonableness of Fees for This Civil Collection Case

In addition to the Court's determination of reasonable and necessary fees incurred in the criminal defense of Ms. Strohm, the Court must determine a reasonable fee in this collection case. The billing rates for all Dorsey professionals and para-professionals shall be as set forth above.

The Court has already determined that the prevailing party in this civil case is entitled to reasonable fees and expenses. Based on this Ruling and Order, if there was any doubt regarding the prevailing party, regardless of the theory employed, there can be none now. Plaintiffs have prevailed and are entitled to fees pursuant to the explicit language of the engagement agreements. The factors the Court considers have been addressed above.

There is no doubt that the fees claimed by plaintiff for

enforcement of the right to reimbursement or indemnity are very substantial. The total fee claim before the Court on the civil matter is $1,088,145.74 comprised of $1,021,093.25 in attorney's fees and $67,052.49 in costs. The attorney's fees will be reduced in an amount to be calculated based on the rate adjustments above.

The Court must consider whether all of the fees incurred were in fact necessitated by work on compensable claims. A party may not be entitled to fees it charged to prevail on certain claims where that work substantially overlaps with the fees charged for pursuing unsuccessful claims. See Jensen v. Sawyers, 2005 UT 81, ¶ 129 (upholding the trial court's finding that a prevailing party was not entitled to all fees where the trial court found there was "not a core of facts common to all claims, and the legal theories [were] . . . unrelated. . . . [and where] not only was some of the time spent on unsuccessful issues, a large portion of time was spent establishing the non-compensable claims."). Because a party may only recover fees associated with the claims on which it prevailed:

> [A] party seeking fees must allocate its fee request according to its underlying claims. Indeed, the party must categorize the time and fees expended for '(1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees.'

Prince v. Bear River Mut. Ins. Co., 2002 UT 68, ¶ 56 (internal citations omitted).

A Court "may not award wholesale all attorney fees requested if they have not been allocated as to separate claims and/or parties.'"

Id. (citation omitted); see also Keith Jorgensen's, Inc. v. Ogden City Mall Co., 2001 UT App 128, ¶ 32 (stating "[i]f a party fails to properly apportion attorney fees, a trial court may deny that party's fee request."). "[A] prevailing party may collect attorney fees on noncompensable claims only if those claims substantially overlap with compensable claims." Jensen, at ¶ 130 (citing Keith Jorgensen's, Inc. v. Ogden City Mall Co., 2001 UT App 128, ¶ 30). If the separation is possible, the party claiming the fees has the burden of allocating fees charged, and failure to do so can result in a denial of all fees.

ClearOne suggests that no more than 40% of the fees charged on the collection case relate to compensable claims. The Court finds the argument, the expert's report, and the supporting Declaration of Neil A. Capobianco to be unpersuasive. It is true that this litigation involved allegations based on the Employment Termination Agreement, statutory indemnification provisions, the engagement agreement, and equitable claims. The award being considered at this time is based almost exclusively on the engagement agreements and the statutory indemnification provisions of Utah law. Of course, the actual basis for the award is limited to those two sources, but it would be incorrect to suggest that the Court has not had to consider the ETA and its provisions in reaching its determinations. Accordingly, to the extent the work done has addressed any of the agreements or statutes at issue, the work is compensable.

The equitable theories are a little more in doubt. There is no question that the equitable theories were reasonable alternative

theories to pursue, but in fact the prevailing arguments are all based on statute or contract. The difficult question is how to ascertain the amount of time spent on equitable theories that did not ultimately prevail. The Court's view in this case is that much of the work done regarding the equitable theories was in fact closely interrelated with the work done regarding the successful theories including, specifically, discovery. Beyond that area, there was in fact not much work expended on pursuing the equitable theories, certainly not after the Court's initial ruling on mandatory indemnification, and its later Ruling regarding the engagement agreement. Based on this assessment, the Court agrees that there should be an overall reduction, but that reduction should be limited to 5% of the total fees and costs claimed by plaintiff, which 5% shall be applied to the fees and costs recalculated based on the hourly rates allowed herein.

The Court concedes that at some level it is troubled by the overall costs of this litigation, but this Court does not set market rates. Its function is merely to consider what is a reasonable rate in light of the existing market, and one factor in considering an overall reasonable fee in this collection case is the amount of fees charged by ClearOne's counsel. The Court does not have benefit of detailed billing statements, and the Court recognizes that ClearOne's counsel are based in New York City, one of the highest billing locations in the country. Moreover, ClearOne's counsel's rates are not to be scrutinized under the Salt Lake market standard, because the Court is not making any award in favor of ClearOne. Nevertheless, it

is informative to the Court that ClearOne has billed approximately $740,000 in this civil case since its inception. One conclusion to be drawn from that information is that no matter how much concern this Court may have with such vast expenditures on what is essentially a collection case, albeit a complicated and aggressively fought case, plaintiffs' claim, particularly when reduced to reflect the rates allowed by the Court, is reasonable.

Plaintiffs also seek interest on the fees and costs at the rate of 18% from and after June 29, 2010, until paid. See the following ruling addressing prejudgment interest.

Finally, the Court expressly imposes August 10, 2010, the date of the last services billed in the collection case (invoice date September 3, 2010) before argument on the motions decided herein. In proceedings to enforce attorney's fees and costs provision, the ever accruing charges must stop at some point. The Court recognizes that additional work has been done, mostly preparation for argument and two hearings, but the Court deems it an unwise practice to entertain post-argument and submission billings, which themselves must be examined for reasonableness, a practice which can only delay final adjudication.

Prejudgment Interest

Plaintiffs request prejudgment interest at 18% on both the fees awarded for defense of the criminal case, and any fees awarded in connection with plaintiffs' prosecution of the collection case. Plaintiffs' support for such an expansive right to prejudgment

interest is stated succinctly: "[p]ursuant to this Court's March 2, 2010 Ruling and Order." Milo Steven Marsden Declaration, June 30, 2010, at 20. It is probably the Court's fault, but plaintiffs read these few words too expansively.

In fact, the Court ruled, "the provision [in the first letter agreement] for interest at 18%; however, is a contractual provision, that is carried forward to the second letter agreement, and it is enforceable unless determined to be unconscionable as a matter of law." Ruling at 11 (citation omitted). And a few pages later: "Plaintiffs are also entitled to judgment for interest and fees incurred in seeking recovery under the letter agreements." Ruling at 13.

The second sentence certainly could have been better drafted. Perhaps "Plaintiffs are also entitled to judgment for interest [on unpaid fees under the letter agreements] and fees incurred in seeking recovery [in the collection action] under the letter agreements." The point is that the sentence was never intended to prejudge whether plaintiffs are entitled to interest on unpaid fees, plus fees incurred in the collection case, and interest on fees subsequently awarded in the collection case.

In any event, while the parties have argued the interest rate issue; that is, unconscionability, the briefing does not raise the issue of whether prejudgment interest is appropriate on the fees on the collection case. Again, this oversight probably results from the Court's ambiguous, at best, statement, but the issue must be

addressed.

Interest on a fee award presents an unusual analytical task, and in this case the Court determines that while prejudgment interest, at 18%, is awardable on the fees incurred and billed in the criminal defense, as adjusted herein, no prejudgment interest should be awarded on the fees determined by the Court in the collection case.

The determination of entitlement to prejudgment interest is a question of law, reviewed by the appellate court for correctness. Lefavi v. Bertoch, 2000 UT App. 5, ¶ 24, 994 P.2d 817, 822 (citing Cornia v. Wilcox, 898 P.2d 1379, 1387 (Utah 1995)). Thus, the trial court may not exercise discretion on this important question. Since 1907, Utah courts have awarded prejudgment interest in cases where "damages are complete," and where they can be measured by "fixed rules of evidence and known standards." Fell v. Union Pacific Railway Co., 32 Utah 101 (1907) (cited in Smith v. Fairfax Realty, Inc., 2003 UT 41, ¶ 17, 82 P.3d 1064, 1068.

General language in cases not addressing interest on a fee award is of limited assistance, but articulation of the purpose behind an award of prejudgment interest is helpful: "Prejudgment interest is awarded 'to compensate a party for the depreciating value of the amount owed over time and, as a corollary, [to] deter[] parties from intentionally withholding an amount that is liquidated and owing.'" Lefavi, 2000 UT App 5, ¶ 24, 994 P.2d 817, 822-23 (citations omitted). See also, Carlson Dist. Co. v. Salt Lake Brewing Co., L.C., 2004 UT App 227, ¶ 32, 95 P.3d 1171, 1179.

This language suggests, to this Court, a distinction between entitlement to prejudgment interest in the criminal defense and the collection case. In the former, every month ClearOne had an invoice, and a certain sum was claimed. Timely payment was promised by contract, and if payment was not made, an agreed interest rate applied. ClearOne had it in its power to avoid an interest charge following an adverse adjudication by paying under protest, and seeking an adjustment in this collection case, or in a case ClearOne might have filed. In the later matter, this collection case, the fees, particularly their reasonableness, were unknown until this Ruling and Order. Prejudgment interest on attorneys fees cases typically disallow such interest.

As of 1994, there were apparently only three Utah cases addressing the specific issue, and the latest case makes a good argument that the other two cases are not much help. In James Constructors, Inc. v. Salt Lake City Corporation, 888 P.2d 665 (Ut.App. 1994), the court decided the issue of whether prejudgment interest may be awarded when the entitlement is provided by contract, but the "ultimate determination of the reasonableness of the fees is left to a factfinding court." Id. at 672. The answer was no, but this Court finds the facts and the issue in the present case distinguishable.

That is, the letter agreements require payment in full of the billed amount, on time, or interest applies. A later dispute over both entitlement and reasonableness may well change the ultimate obligation

of the party that agreed to pay fees, but to the extent the billed fee, or a portion of it as determined by the Court, is found to be owed, it is illogical that the obligor should avoid the contractual interest by refusing to pay anything under the agreement.

For the foregoing reasons, the Court determines that prejudgment interest does not apply to the fees awarded in the collection case. For fees awarded post-March 31, 2008, in the criminal case, prejudgment interest applies to each invoice billed post-March 31, 2008, at the contractual rate of 18%, with each invoice to accrue interest on the adjusted amount provided herein from the date on which it would have become due under the contract. Accordingly, Dorsey must complete a couple of tasks: adjusting each invoice consistent with this Ruling on billable rates, and calculating interest based on the adjusted invoice, from the date interest accrues until judgment, after which date interest shall accrue at 18% on the criminal case fees and costs.

The letter agreements do not include an interest provision that applies to the collection case. The contractual rate applies only to amounts billed in the criminal case, and unpaid after thirty days. Accordingly, the collection case fees awarded herein shall bear no prejudgment interest, but the entire collection case fees and expense judgment shall accrue post-judgment interest at the 2011 statutory rate of 2.3% until the judgment is paid.

ORDER

A number or orders are stated in the foregoing Ruling. The Court

summarizes those orders at this point, but the detail included above is incorporated into this Order:

1. Defendant ClearOne's Cross-Motion for Summary judgment is DENIED.

2. Plaintiffs' petition for an Award of Reasonable Attorney's Fees and Costs is GRANTED for both the criminal defense case, and for fees and costs incurred in this collection case, as follows:

a. In the criminal defense matter, Ms. Strohm and her counsel, Dorsey & Whitney, are awarded all hours and expenses billed and paid by ClearOne through and including the invoice that closed on March 31, 2008, with no retrospective adjustment or reimbursement.

b. In the criminal defense matter, commencing April 1, 2008, Ms. Strohm and Dorsey are awarded all hours billed through and including February 27, 2009, the date on which the federal jury verdict was returned convicting Ms. Strohm of one count; namely, perjury. The billed hours are to be recalculated by plaintiffs applying the hourly rates set forth in the foregoing Ruling. Plaintiffs' are also awarded all expenses billed through February 27, 2009, in the amounts billed with the sole exception of an adjustment to travel time (for Mr. Michael or any other Dorsey timekeeper) consistent with this Ruling regarding travel expenses.

c. In the criminal matter, Dorsey is awarded prejudgment interest at the contract rate of 18%, simple interest,

commencing 30 days after the first invoice post-March 31, 2008, which invoice is dated May 22, 2008 through the ultimate date of the Judgment to be entered consistent with this Ruling and Order. Interest on each succeeding invoice shall be awarded commencing thirty days after the date of each respective invoice. When judgment is entered, the full judgment amount shall continue to bear 18% simple interest, until paid.

d. In the criminal matter, fees and expenses billed commencing February 28, 2009, are not awarded at this time, but final determination of any award from February 28, 2009, through completion of the criminal case shall await the ultimate adjudication of Ms. Strohm's guilt on the perjury count, whether on appeal, or on remand, should that occur. The Court specifically retains jurisdiction too address that issue should Ms. Strohm be ultimately adjudicated not guilty of all charges.

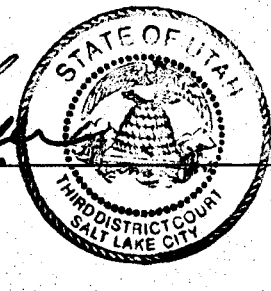
e. In this collection case, Ms. Strohm and Dorsey, as prevailing parties, are awarded all fees and expenses billed through August 10, 2010, subject to the same hourly rate and travel expense adjustments the Court has required with respect to the criminal defense billings, and further subject to the five percent deduction imposed by the Court to address work and expenses done to pursue unsuccessful claims or theories.

3. Plaintiffs' counsel shall prepare a final Judgment consistent with this order, which judgment shall be submitted to the Court after defendant's counsel have the time required by Rule 7, Utah R. Civ. P., to approve or submit any objections to the Judgment.

Dated this 24th day of January, 2011.

By the Court:

Robert K. Hilder
District Court Judge



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Ruling and Order, to the following, this 24th day of January, 2011:

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Addendum 11

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IN THE THIRD JUDICIAL DISTRICT COURT
COUNTY OF SALT LAKE STATE OF UTAH

SUSIE STROHM and DORSEY & WHITNEY LLP, Plaintiffs, vs. CLEARONE COMMUNICATIONS, INC., Defendant.	**JUDGMENT** Case No. 080917500 Judge Robert K. Hilder

This action came on for hearing before the Court on September 20 and 23, 2010, the Honorable Robert K. Hilder presiding. Having heard the parties' oral arguments, reviewed the parties' submissions, the pleadings, depositions, and other factual material from the record, the Court's prior Order-Indemnification (dated 11/19/2009) and Ruling and Order (dated 3/2/2010), and being fully advised in the premises, on January 24, 2011, the Court entered its Ruling and Order on plaintiffs' Petition for an Award of Reasonable Attorney's Fee and Costs and the Cross

Motion for Summary Judgment and Opposition to Fees submitted by defendant ClearOne Communications, Inc., ("Defendant").

Having in addition determined that there is no just reason for delay, the Court now enters final judgment pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, as follows:

IT IS ORDERED AND ADJUDGED that:

1. Plaintiffs' Petition for An Award of Reasonable Attorney's Fees and Costs is granted in part, as set forth below;

2. Judgment is entered in plaintiff Dorsey & Whitney LLP's favor on the Third Claim for Relief of the First Amended Complaint;

3. Judgment is entered in plaintiff Susie Strohm's favor on the Seventh Claim for Relief of the First Amended Complaint;

4. Plaintiffs are awarded all hours and expenses billed and paid by ClearOne through and including the invoice that closed on March 31, 2008, with no retrospective adjustment or reimbursement;

5. Plaintiffs are awarded and shall recover from defendant ClearOne Communications, Inc.,

a. the sum of $972,737.37, as reasonable fees and expenses incurred in *U.S.A. v. Frances M. Flood and Susie Strohm*, 2:07-cr-00485, for the period from April 1, 2008 through and including February 27, 2009;

b. prejudgment interest on that amount at the contract rate of eighteen percent (18%), simple interest, in the amount of $362,171.48 through February 1, 2011, together with $479.71 per diem thereafter, until paid;

c. the sum of $865,490.41, as the compensable reasonable fees and expenses incurred in this matter, for the period through and including August 10, 2010; and

d. post-judgment interest on that amount at the statutory rate of two point three percent (2.3 %), in the amount of $54.54 per diem, from the date of this JUDGMENT, until paid.

DATED at Salt Lake City, Utah this 8th day of June, 2011.

BY THE COURT:

Honorable Robert K. Hilder
District Judge